No. 2259

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY, a Corporation,

Plaintiff in Error—Appellant,

vs.

THOMAS P. CLARK,

Defendant in Error—Respondent.

Upon Writ of Error to the District Court of the United States for the District of Arizona.

Brief of Defendant in Error.

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STATEMENT OF FACTS.

This suit was brought under the Federal Employers' Liability Act, to recover damages on account of negligence of appellant, by which respondent sustained personal injuries.

Both parties to this action are residents of Arizona; that appellant is the owner of a railroad extending from Clifton, Arizona, to Hachita, New Mexico, and maintains railroad yards at said Clifton; that respondent is a locomotive engineer, and as such was employed by appellant in its yards at said Clifton, in charge of a switch engine, on March 15th, 1911, and at which time there was brought into said yards twelve foreign freight-cars of the Colorado and Southern Railway Company, from Grey Creek, Colorado, which were loaded with coke in Colorado and consigned to the Shannon Copper Company, at said Clifton; that from said yards there is a switch

road running a distance of three-quarters of a mile to Shannon Copper Company's smelter, and while the respondent was at said switch and in the act of moving said cars to said switch, in order to deliver the same to said consignee, on March 15, 1911, he was injured by reason of four of said cars which had been left on an incline track of appellant about 600 feet above the point of said switch, without the brakes having been set thereon, and while respondent was moving four of said cars down the appellant's track, and in the act of passing on to said switch, the said four cars which had been left on said incline came running down and collided with said switch engine, resulting in said injuries, and on account of which this action was instituted January 18, 1912, in the District Court of the Fifth Judicial District of the Territory of Arizona, on the Federal side of the court, and thereafter Arizona, on February 14, 1912, became a State, and this action was transferred to the District Court of the United States for the District of Arizona, where it was tried and judgment rendered on November 16, 1912, in favor of respondent for $12,675.

The Second Amended Complaint, set out in Transcript, pages 47 to 59, upon which this action was tried, is very lengthy, and but very brief reference thereto will be made. It charges negligence in a number of particulars, and alleges that the several negligent acts concurred and were the proximate cause of the injury. A brief summary thereof is as follows:

That appellant was negligent in setting out the

four freight-cars on a downgrade without setting the brakes thereon to prevent their running away and colliding with said engine respondent was operating; that it was the duty of appellant's employees to warn respondent of approaching cars, which they negligently failed to do; that said employees negligently gave a stop signal when none should have been given, and by reason thereof respondent stopped his engine and was caught in said collision; that the roadbed was defective and unsafe, and that appellant did not furnish respondent a reasonably safe place in which to perform said work; that appellant carelessly ran and managed said freight-cars, thereby causing said collision; that respondent was further injured by appellant's neglect to formulate, promulgate, and enforce proper rules for the safety of respondent and his coemployees, and that appellant conducted its works by insufficient signals, material and men, and that it conducted its works by unsafe and dangerous methods; that on account of said collision respondent was severely injured, and for a long time confined to his bed, lost an eye, sustained hip and spinal injuries, three broken ribs, and that said sickness produced pneumonia, which resulted in chronic nephritis; that his injuries are permanent, and have rendered him unable to perform any kind of work; that at the time of his said injuries he was earning $2,100 a year, which salary he had been earning for fourteen years prior thereto.

Paragraph 2 of the complaint alleges, among other things, that the appellant is a common carrier of freight and passengers for hire between the points

mentioned on its line of railroad.

At the time of respondent's said injuries, Arizona was a territory, and the rule announced pertaining to railroads in territories under said Federal Employers' Liability Act, in El Paso & N. E. R. Co. vs. Gutierrez, 215 U. S. 94, Id. 54 L. Ed. 110, is applicable.

The case was properly brought in said territorial District Court on the Federal side thereof (Friday vs. Santa Fe Ry. Co., 120 Pac. [N. Mex.] 316), and under the Enabling Act of Arizona, section 33, and the new Federal Judicial Code, section 64, the case was properly transferred to said United States Court, where it was tried without any question as to the jurisdiction of the Court over the same.

It was not necessary for respondent to have alleged that he was employed in interstate commerce when he was injured. However, the evidence shows that he was so engaged in removing and delivering the said foreign freight-cars to the said assignee, Shannon Copper Company, over said switch, and was clearly within that rule.

Thornton on the Federal Employers' Liability and Safety Appliances, 2d. ed., p. 46, note 12, and pp. 48, 49, note, 12.

McNeill vs. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142.

Rhodes vs. Iowa, 170 U. S. 412.

To switch interstate cars is to engage in interstate commerce.

Union Stock Yards Co. vs. United States, 169 Fed. (C. C. A.) 404.

Doherty on Liability of Railroads to Interstate Employees, pp. 80, 81.

The evidence is voluminous, and shows very clearly that appellant was negligent in failing to set the brakes on the cars set out on the incline track, when its rules so required it to do, and that respondent had no warning of the collision, and that the servants of appellant neglected to secure said cars to prevent their escape, and negligently failed to warn respondent of such danger until too late, and then gave the wrong signal, which aided in bringing about the injury; and the evidence shows it was dangerous to leave unblocked cars on said incline, and that the employees of appellant knew that fact at and before the time of collision, but failed to perform their duty; that appellant failed to promulgate and enforce reasonable rules for the movements of its cars, and, in consequence of all, the respondent sustained his said injuries.

There is some contention that respondent improperly united in his complaint common law and statutory negligence, but such contention is untenable. The Federal statute covers both forms of negligence, and the same may well be blended in one count, and do not constitute separate causes of action.

De Atley vs. Chesapeake & Co. Ry. Co., 201 Fed. 591 (in Pamphlet No. 3 of March 6, 1913).

Colasurdo vs. Central R. R. of New Jersey, 180 Fed. 832, gist 838.

Iarussi vs. Missouri Pac. Ry. Co., 155 Fed. 654.

Appellant contends that respondent's second amended complaint is insufficient, and in relation thereto, has assigned ERRORS I to V, inclusive (Transcript, 628–631), under general and special demurrers, motions to strike, and to make other parts thereof definite and certain.

A sufficient answer to such contention is that the rulings of the Court on said demurrers and motions is not in the bill of exceptions, and cannot be considered.

Ghost vs. United States, 168 Fed. (C. C. A.) 842.

These assigned errors, the action of the Court on such motions, are discretionary.

Deitz vs. Lymer, 61 Fed. 792.

Denver & R. G. R. Co. vs. Wagner, 167 Fed. 75.

It is obvious from the slightest inspection that the demurrers are without merit. The rules of pleading in Arizona are very liberal, and as against a demurrer every intendment will be made to sustain the pleading.

Phillips vs. Smith, 95 Pac. (Ariz.) 91.

Under the Federal practice the same liberal rule attains.

Simpkins' Federal Suit at Law, page 56.

Under the general rules of pleadings the complaint is sufficient.

In an action for negligence, the plaintiff need not set out in detail the acts constituting the negligence complained of.

McLeod vs. Chicago M. & P. S. Ry. Co., 117 Pac. (Wash.) 752.

Nor is the same subject to motion to make more definite.

The Indianapolis etc. vs. Horst, 93 U. S. 291, 23 L. Ed. 898.

Adams Express Co. vs. Aldridge, 77 Pac. (Colo.) 7.

Denver & R. G. R. Co. vs. Vitello, 121 Pac. (Colo.) 113.

Chaperon vs. Portland General Elect. Co., 65 Pac. (Or.) 929.

Plaintiff may allege several acts of negligence in one count where it is alleged that such acts are the proximate cause of the injury, and on trial, proof of any one of such acts shown to have been the proximate cause of the injury is sufficient.

Enid Electric & Gas Co. vs. Decker, 128 Pac. (Okl.) 710, 29 Cyc. 565.

Haley vs. Missouri Pacific Ry. Co., 93 S. W. (Mo.) 1120.

International Glover, 88 S. W. (Tex.) 516.

Fredrick vs. Hale, 112 Pac. (Mont.) 73.

Boireau vs. Rhode Island, 169 Fed. 1015.

A good many cases hold that it is negligence *per se* to permit cars to escape and collide with other cars, as in this case.

Olson vs. Great Northern Ry. Co., 71 N. W. (Minn.) 5.

Troxell vs. Delaware, 180 Fed. 877.

However, this question was properly submitted to the jury to pass upon, there being evidence of such negligence.

The case is made out, if the injury results in whole or in part from the negligence of any of the employees of the company.

St. Louis etc. vs. Conley, 187 Fed. (C. C. A.) 952.

It is negligence to permit cars to run down and collide with others.

Colasurdo vs. Central R. R. of New Jersey, 180 Fed. 835.

Appellant assigned Error VI (Transcript, page 631), in which complaint is made that the Court refused to direct a verdict for appellant at the close of plaintiff's case. There appears to be no merit in that contention.

At the time of the injury the appellant was engaged in the business of common carrier by railroad in the territory of Arizona, and this contention is disposed of by section 2 of the Federal Employers' Liability Act.

El Paso R. Co. vs. Gutierrez, 215 U. S. 94.

And under the evidence and the law hereinbefore cited the appellant was at the time respondent was injured engaged in delivering foreign coke cars to the assignee, Shannon Copper Co., and was engaged in interstate commerce.

McNeill vs. Southern Ry. Co., 202 U. S. 543, 50 L. Ed. 1142.

Further, if there was any error in such ruling it was waived, for the appellant went on and put in its evidence, and did not at the close of all the evidence renew its motion for a directed verdict. It

is the uniform rule that the sufficiency of the evidence to support the judgment cannot be raised in the appellate court, where, as in this case, after the lower court denied the appellant's motion to direct a verdict at the close of the respondent's case, the appellant then put in its evidence and did not at the close of all the evidence renew its motion for a directed verdict.

American Smelting Co. vs. Karapa, 173 Fed. 607.

Grand Trunk Ry. vs. Oliver, 106 U. S. 700, 27 L. Ed. 266.

Roberts vs. Perkins, 129 U. S. 233, 32 L. Ed. 688.

The Columbia etc. vs. Hawthorne, 144 U. S. 202.

Sigafus vs. Porter, 179 U. S. 121, 45 L. Ed. 116.

Appellant contends, under its Assignment of Errors VII and VIII, Transcript, pages 631 to 640, that the witnesses Kelly and Kline should have been permitted to testify, over objection, that respondent had been negligent at other times and places, or that he was habitually negligent. There was no error in sustaining the objection.

"The rule is well settled that when the question is whether or not a person has been negligent in doing, or failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion."

Missouri K. & T. Ry. Co. vs. Johnson, 48 S. W. (Tex.) 568.

Mansfield Coal & Coke Co. vs. McEnery, 91 Pa. St. 185, 36 Am. Rep. 662; 29 Cyc. 619, notes 67, 68; 29 Cyc. 610, notes 23, 24.

Thompson on Negligence, vol. 6, sec. 7792.

Atlanta etc. R. Co. vs. Smith, 94 Ga. 107, 20 S. E. 763.

Towle vs. Pacific Imp. Co., 33 Pac. (Cal.) 208.

21 Ency. Law, 2d ed., p. 518, note 6.

Appellant, under its Assignment of Errors IX to XII, inclusive (Transcript, 640–642), and assigned Errors XIV to XV, inclusive (Transcript, 660–662). All of which pertain to the Court's instructions to the jury, and its refusal to give certain of appellant's instructions; these objections and exceptions are not properly before the Court for consideration, because the fact and truth is that no exception to those instructions, nor exceptions to the ruling of the Court in refusing to give appellant's requested instructions, was taken at the trial, but was in fact taken 20 days after the judgment had been entered on the verdict of the jury. The Transcript of this case shows these facts. Judgment entered November 16th, 1912 (Transcript, 77, 78).

After the jury had retired to consider of their verdict, then for the first time the question concerning exceptions to the charge of the Court arose (Transcript, 492). And while the jury were out considering their verdict, the Court asked the attorneys for the appellant if they thought it necessary to state the grounds of their exceptions to the instructions to the jury, and Mr. Bennett said: "Unless the rules or statute requires it, I don't think so" (Transcript,

493). And then, after the jury were still out considering their verdict, Mr. McFarland, attorney for appellant, made some very general exceptions to the charge of the Court, without any specification of error (Transcript, 493, 494), which are of the most general character of exceptions, and which are entirely insufficient to raise any question for the consideration of this Court, and further, such general exceptions were made too late, after the jury had been instructed and retired to consider their verdict (Transcript, 494). And after the jury had so retired the Court granted appellant permission to embody in its bill of exceptions further objections to the instructions to the jury not then mentioned.

Nothing further was done toward taking exceptions to the instructions to the jury until November 22, 1912, when an order was entered giving the appellant ten days after November 26, 1912, in which to prepare and file its bill of exceptions (Transcript, 624). December 6, 1912, the bill of exceptions was presented to the Court, and on January 6, 1913, it was approved and signed by the Judge and filed (Transcript, 625).

At the bottom of page 616 of the Transcript, we find these words: "The defendant, in accordance with the permission of the Court heretofore granted it so to do, as before stated in this bill of exceptions, now upon the tendering of this bill of exceptions states more fully and in detail the objections to said instructions as follows." It will be noticed that appellant tendered its bill of exceptions on December 6, 1912, and then for the first time presented its ob-

jections to the instructions of the Court, which we find on pages 617–624 of the Transcript, and on said page 624, first paragraph from the top of page, we find this wording: "And time was given, as hereinbefore stated, within which the defendant could prepare and file its bill of exceptions to said rulings."

Now, the record stands in this shape: appellant did not take any exceptions to the Court's instructions to the jury, nor any exceptions to the ruling of the Court in its refusal to give certain of defendant's instructions, until after the jury had retired to consider of their verdict, and then only those general exceptions were taken which we find on pages 493, 494 of the Transcript, and the jury was not recalled, and there was no further exceptions to the instructions, nor to the refusal of the Court to give appellant's requested instructions, until the tender of the bill of exceptions, on December 6, 1912.

Exceptions to a charge, given or refused, must be taken before the jury retire, and the bill of exceptions must show that fact, and if the bill of exceptions does not so show, the Court on appeal has no jurisdiction to consider the alleged error.

Star Co. vs. Madden, 188 Fed. (C. C. A.) 910.
Klaw vs. Life Pub. Co., 145 Fed. (C. C. A.) 185.
Simpkins' Federal Suit at Law, page 113.

We join in the remark of Judge Van Devanter in the case of Chicago, Great Western Ry. Co. vs. M'Donough, 161 Fed. (C. C. A.) 659:

"The practice of filing such a large number of assignments cannot be approved. It thwarts the

purpose sought to be subserved by the rule requiring any assignments. It points to nothing. It leaves the opposing counsel and the Court as much in the dark concerning what is relied on as if no assignments were filed."

Those general exceptions to the instructions to the jury were insufficient to present a question for the consideration of this Court, if the same had been taken before the jury had retired to consider of their verdict.

American Smelting & Refining Co. vs. Karapa, 173 Fed. (C. C. A.) 608.

Penn. Co. vs. Whitney, 169 Fed. (C. C. A.) 577.

Simpkins' Federal Suit at Law, page 114.

It would appear that we ought not inquire further about the exceptions to the Court's charge to the jury. However, we will take each one up.

Appellant, under Assignment of Error IX (Transcript, 640, 641), claims error in charge to the jury on assumption of risk. The first part thereof, beginning with the word "But," continuing on page 641, and closing with the words "not so engaged," was copied from Richardson vs. Klamath S. S. Co., 126 Pac. (Ore.), 26, 2d column, par. (3); same rule applied in Westine vs. Atchison T. & S. F. Ry. Co., 114 Pac. (Kan.) 219, 222; same rule announced by Judge Hunt in Williams vs. Bunker Hill & Sullivan Min. Co., 200 Fed. 211, 216.

That portion of the instruction (Transcript, 608) beginning with the word "Now," and closing with the words "have produced the injury," is a copy of

the Court's charge in Northern Pac. Ry. Co. vs. Maerkl, 198 Fed. 1, and there had the consideration of this Court. In the Maerkl Transcript, page 151, this instruction appears, and in that case the defendant in error, in his brief, page 39, says:

> "The statement that the unknown risk was not assumed is but the converse of the statement, that the employer was guilty of actionable negligence, and the authorities which we have cited under that point are applicable here."

The same doctrine is announced by this Court in Sandidge vs. Atchison T. & S. F. Ry. Co., 193 Fed. 878.

The remaining portion of that instruction, under appellant's Assignment of Error IX, page 641 of the Transcript herein, in which the Court told the jury "that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employee of the defendant," was a correct statement of the law.

Wright vs. Yazoo & M. R. Co., 197 Fed. 94, 97.
Northern Pac. Ry. Co. vs. Maerkl, 198 Fed. 6.
Sandidge vs. Atchison T. S. & F. Ry. Co., 193 Fed. 878.
Choctaw O. & G. R. Co. vs. McDade, 191 U. S. 67, 48 L. Ed. 100.

The appellant, under its Assignment of Error X (Transcript, page 641, claims error, in that the Court instructed the jury, "If the plaintiff is guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will then

give an award of one-half of the damages it would have given if he had been free from negligence; but if he be twice as negligent as the defendant company, then a third will be the proportion of damages he will receive, and so on, whatever the proportion may be."

We see no error in this instruction. Under section 3 of the Federal Employers' Liability Act, 1908, such instruction should be given the jury. In the case of Northern Pac. Ry. Co. vs. Maerkl, 198 Fed. 1, the same instruction was given the jury. See Transcript Maerkl Case, pages 144, 145, where it will be found.

Thorrton on Federal Employers' Liability Act (2d ed.), sec. 86, page 140, says such instruction should be given to the jury.

The appellant, under its Assignment of Error XI, claims the Court erred in instructing the jury on the doctrine of contributory negligence because it used this language: "That is, subject to the qualification that if the contributory negligence or the negligence of the plaintiff was so willful and of such a character as that the jury might say that it was the direct and proximate cause of the injury, then the plaintiff could not recover by reason of such negligence. The distinction between the two cases being that the negligence of the plaintiff in the one case, instead of being a contributing cause, was so gross, so willful and extended to such an extent as that the jury may say that it was the direct and proximate cause of the injury."

The effect of this instruction was to inform the jury that if the plaintiff was injured by reason of his

own negligence, he could not recover. It would not make any difference, under the Employers' Liability Act, whether plaintiff's negligence was willful or gross, or by whatever name we may designate it, if his negligence in any form was such that the jury could say from the evidence that it was the proximate cause, the plaintiff could not recover.

The Federal statute does not recognize degrees of negligence, but prevents the plaintiff from recovering when his negligence, whatsoever the form thereof may be, becomes the approximate cause of the injury.

Thornton on Federal Employers' Liability Act, 2d ed., sec. 89, p. 143.

This instruction did not mislead the jury as to the law of the case, and was but an explanation of a preceding instruction, and was intended to inform the jury that plaintiff could not recover if his negligence was of such a character that the jury could say that it was the proximate cause of the injury.

We ought to view the instructions as a whole, and if upon the main they are correct, there is no error.

The Court very fully covered all features of the case in its instructions. Beginning on page 603 of the Transcript, the Court defined the issues. On page 605, informed the jury that the negligence must be proven and established as the basis of any recovery in this case, and there very clearly defined the term "negligence," and informed the jury whether negligence existed was a question for the jury. On page 607, informed the jury that it must be shown that defendant's negligence was the proximate cause of

the injury. On page 609, the Court told the jury, using this language, "Now, if you find that the defendant was guilty of negligence in the particulars mentioned which directly contributed to the collision in which the plaintiff was injured, then you will consider the further question whether or not the plaintiff was guilty of contributory negligence. By contributory negligence is meant that the plaintiff himself in and about the occurrence was guilty of lack of ordinary care—in other words, guilty of negligence—and that plaintiff's negligence contributed to the production of the injury so that without it the injury would not have occurred. If you find that a state of affairs existed so that but for the negligence of the plaintiff the accident would not have occurred, you will find that he was guilty of contributory negligence." Then follows the excerpt of which appellant complains. But the appellant did not include in his excerpt any portions of the following instruction. After which the Court told the jury: "If you so find, it will be your duty to ascertain in what degree the negligence of the two parties contributed to bring about the result, and you will then diminish the amount of the recovery," etc. Then, just following page 610, the Court told the jury, "Now, the burden is upon the plaintiff to prove that the defendant was guilty of negligence, and that negligence caused the injury." And on the same page instructed the jury that the plaintiff must make out its burden of proof. On page 613 of Transcript, told the jury if the defendant was not guilty of negligence, that they should find for the defend-

ant. On page 614 of the Transcript the Court charged the jury: "The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the defendant company was guilty of negligence, and that such negligence was the proximate or immediate cause of the injury complained of; and unless the plaintiff has established by a preponderance of the evidence in this case that the defendant was guilty of negligence, your verdict must be for the defendant."

There was no evidence in the case which showed that the respondent was guilty of any negligence, or that his negligence in any way contributed to bring about the injury. As far as the facts are concerned, the charge on contributory negligence could well have been left out of the case. The jury were told a number of times in the charge of the Court that the plaintiff must prove by a fair preponderance of the evidence that the defendant was guilty of negligence, and such negligence was the proximate cause of plaintiff's injuries. There can be no question that the jury were correctly informed on the law, of the issues and of their duty. The instructions were more favorable to appellant than the facts warranted.

If the appellant was guilty of any negligence producing the injuries the respondent should recover.

Grand Trunk Western Ry. Co. vs. Lindsay, 201 Fed. (C. C. A.) 841 (pamphlet).

Louisville & N. R. Co. vs. Wene, 202 Fed. (C. C. A.) 887, 891, (in pamphlet).

The appellant, under its Assignment of Error XII

(Transcript, page 642), contends that the Court misdirected the jury in its charge. The excerpt taken is but a fragment of the instruction, and when the whole instruction is taken into consideration, it will be found correct. The full charge complained of is set out in the Transcript, page 613, in which the Court told the jury:

> "I charge you further that even if the defendant left the cars under the circumstances detailed in this case on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of collision, yet if the plaintiff was warned of the danger and was given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger signal, he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then willfully or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the injury, and the plaintiff cannot recover."

Under the law already cited, it is plain that this instruction is as favorable as the appellant could ask, for if it was negligent, it was liable, and if the respondent was injured through his own negligence and carelessness, he could not recover; but if the respondent was injured through the joint negligence of himself and the appellant, yet he is entitled to recover.

The appellant, under its Assignment of Error XIII (Transcript, 642), claims the Court erred in

holding the offered testimony of Dr. H. H. Starck privileged, and excluding it on that ground.

The Revised Statutes of Arizona of 1901, section 2535, provides that "The following persons cannot be witness in a civil action." And subdivision 6 of that section is as follows:

> "A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient: Provided, That if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney."

This statute is perhaps broader than most statutes on that question, and under its provisions the Court held the offered testimony of Dr. Starck privileged, and refused to permit Dr. Starck to testify. There was testimony before the Court which showed that the relation of physician and patient did exist under the law. There was some conflict in the testimony whether or not the relation of physician and patient did exist. From the plaintiff's testimony it fully appears that the relation did exist, and this presented a question for the lower court to pass upon. The trial court must pass upon such question in the first instance, and if there is any evidence at all to sustain the ruling of the lower court, the appellate court will not disturb the ruling. The lower court

had the right to believe Dr. Starck or believe Mr. Clark, and because the trial court believed Mr. Clark, and found that the relation of physician and patient did exist, although the testimony was conflicting on that point, does not afford any ground for complaint on that ruling in this Court. It was discretionary with the trial court as to whose version of the matter it would believe, and that discretion will not be disturbed on appeal, unless it clearly appears that the lower court abused its discretion.

We will take a few excerpts of the testimony on this question.

Testimony of Dr. STARCK (Transcript, 644):

"Q. At whose instance did you see him?

A. Mr. A. T. Thompson.

Q. Mr. Thompson was at that time connected with the defendant railway company?

A. Yes, sir. I don't know what his position was at that time—he was the head of it.

Q. Where did you see Mr. Clark?

A. At Clifton.

Q. Where in Clifton?

A. At the A. C. Hospital.

Cross-examination (Transcript, 645):

Q. At the hospital of the defendant company in Clifton? A. Yes, sir.

(Transcript, 646:)

Q. In other words, no other doctor was present?

A. Dr. Dietrich might have come in.

(Transcript, 647:)

Q. Did you tell him you were a doctor?

A. Yes, I believe I did tell him—most of the in-

troduction was done on my part. I told him I was up there to examine him and he consented to it.

Q. Did you tell him anything about any special employment for the company?

A. I don't remember whether I did or not.

(Transcript, 648:)

Q. So your only knowledge was derived at that interview? A. As to the condition of his eye?

Q. Yes? A. Yes, sir.

(Transcript, 649:)

Q. So you can say that all the subject symptoms that you discovered to exist in his case were derived from him on that occasion?

A. Yes, sir; that is right.

A. T. THOMPSON (Transcript, 649):

Q. Do you know whether Mr. Clark knew that Dr. Starck was not one of the regular employed physicians of the defendant?

A. I don't know what he knew.

Q. Isn't is a fact that you compensated him out of the funds of the defendant? A. Yes, sir.

(Transcript, 650:)

Q. Isn't it a fact that the defendant maintains a so-called medical department or hospital?

A. Yes, sir; it did at that time.

A. It included every medical attention—every care in the hospital in case of injury.

Q. Every medical attention and all the facilities of the hospital. A. Yes, sir.

Q. That includes, of course, the diagnosis of a man's injuries at the company's hospital?

A. Oh, yes.

THOMAS P. CLARK (Transcript, 655):

Q. Tell us what the hospital was where you were examined. A. They call it the A. C. Hospital.

Q. Is that, or is it not, the hospital in which the injured employees of the defendant are examined?

A. Yes, sir.

Q. Who was it that requested you to be examined, if anyone, by Dr. Starck?

A. I think it was Dr. Dietrich.

Q. You think Dr. Dietrich suggested it?

A. Yes, sir. He told me when he would be there.

Q. Was anything said to you in reference to the purpose for which the examination was requested or required? A. To examine my eye.

Q. Dr. Dietrich was then in attendance upon you as your physician?

A. I was still under his charge.

(Transcript, 656:)

Q. You don't know for whose benefit it was to be made? A. For my benefit, I suppose.

Q. Did you or did you not believe that Dr. Starck was in consultation with Dr. Dietrich, your attending physician? A. Yes, sir.

(Transcript, 657:)

(Examination of witness by the Court:)

The WITNESS.—I told Dr. Dietrich about it and he tried to examine it himself, and then he made the date with Dr. Starck a few days afterwards.

(Transcript, 658:)

(Examination by the Court:)

Q. What did you understand was the object of

this examination of your eye?

A. To know whether it was injured or not.

Q. What difference did it make whether it was injured or not in your judgment?

A. It would make a whole lot. (Transcript, 659.)

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it? A. I did. (Transcript, 659.)

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Dietrich, he said they had no oculist and that they would get one, and then I left the thing to Dr. Dietrich, and when they made the appointment, I appeared.

(Transcript, 659, bottom page:)

Q. You knew that he came from El Paso?

A. I heard that.

Q. You heard that before?

A. I heard it at the examination. Dr. Dietrich said he would have their man."

It is plain from this evidence that it was the duty of appellant company to employ physicians to treat its injured servants, and that Dr. Starck was so employed, and that Dr. Dietrich, Clark's attending physician, informed Clark that appellant would get an oculist, call in their man, to examine his eyes, and that Dr. Dietrich made the arrangement and informed Clark that their man was there to examine his eyes, and that Clark believed the examination was for the purpose of treating his eyes, and was

to be made for his benefit.

From a knowledge of the duty of appellant to furnish physicians to treat its injured employees, the action of the company, the promises and conduct of Dr. Dietrich, Clark was led to believe that the examination was for his benefit. The evidence shows that the company and Dr. Dietrich failed to inform Clark of the true mission of Dr. Starck. He was given no information that the examination was desired by the company for the purpose of evidence in this lawsuit, but, on the contrary, the company led Clark to believe that the examination was for his benefit.

It clearly enough appears that the company and Dr. Dietrich resorted to tricks and deception for the purpose of obtaining evidence for a lawsuit, and make Clark believe that the true object was for his benefit, and for the purpose of treating his eye if anything could be done for it. As Clark stated, that it made all the difference to him—"From good sight to blindness, I wanted that information. I wanted to know the condition of it."

We think it well settled that evidence so obtained cannot be used.

> "A physician sent by an officer of a defendant corporation in a personal injury case to examine the plaintiff, although for the purpose of obtaining evidence, and the patient believes that the doctor was called for the purpose of treating him and submits to an examination under such belief, the knowledge and information so obtained is privileged."

Munz vs. Salt Lake City Ry. Co., 70 Pac. (Utah) 852.

1 Elliott on Evidence, p. 741, sec. 634.

Underhill on Criminal Evidence, 2d ed., sec. 179.

The leading case on the question of privileged communication, and which holds that if such information be obtained by trick, deception, misrepresentation, or by any other means, whereby the patient is made to believe that the examination is to be made for his benefit, the information so obtained is privileged.

The People vs. Ira Stout, Parker's Criminal Reports (N. Y.), vol. 3, pp. 670, 675; this case was reaffirmed in People vs. Austin, 93 N. E. (N. Y.) 59.

"A physician sent to a prisoner, who accepts his services professionally, and the disclosures so made are privileged."

People vs. Murphy, 4 N. E. (N. Y.) 326.

"A physician called in by an attending physician, or by friends, or by strangers, and who makes an examination of the patient, or learns from the patient the nature of his injuries, such knowledge and information are privileged, and the physician cannot give testimony of the same."

Reinhan vs. Dennin, 9 N. E. (N. Y.) 320, 322.

Union Pac. R. Co. vs. Thomas, 152 Fed. 365.

"If a physician attends a person under circumstances calculated to produce the impression that he does so professionally, and his visit is so regarded and acted upon by the person, it is enough to establish the relation."

"These statutes are designed to protect the

patient, not the physician, and, being remedial in their nature, ought to receive a liberal construction which will fully effectuate their wise and humane provisions."

Underhill on Criminal Evidence, 2d ed., sec. 179, p. 341.

Freel vs. Market Street Cable Ry. Co., 97 Cal. 40.

23 Ency. Law (2d ed.), pp. 84, 85.

"The refusal to permit a physician called as an expert to testify in a negligent action is not ground for reversal, where the record does not show what testimony the witness was expected to give, or that he was qualified to give any."

Henrencia vs. Guzman, 219 U. S. 44, 55 L. Ed. 81.

Appellant, under its Assignment of Error XIV (Transcript, 660), claims that the Court erred in failing to give appellant's instruction set out on pages 660, 661. The Court had fully instructed the jury on all facts of the case, and this instruction is not the law of the case, and if given would have absolved the defendant from liability on account of its negligence, and prevented a recovery if the plaintiff was in anywise negligent, although defendant was guilty of bringing about a state of affairs which materially produced the injury. In that instruction the appellant asked the Court to instruct the jury:

"If it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed

to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case."

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasonably prevented, defendant is not liable."

And on page 661, Transcript, the objectionable portions of the charge are:

"Yet if plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoided the collision, and he negligently or purposely did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover."

Of course the statute is, that the defendant is liable for an injury resulting in whole or in part from the negligence of any of its employees. Defendant's requested instructions eliminated that feature of the law.

Next, appellant wished to have the Court tell the jury: If the movement of the cars "was being performed in the manner usually adopted in well-managed and operated railroads and generally recognized as good railroading," then the defendant was not liable.

Well-managed and operated railroads had nothing to do with the question. All railroads at times are guilty of negligence, and the question at bar was,

in that particular instance, Was the defendant guilty of negligence? The instruction was misleading.

The latter part of that instruction, pertaining to assumption of risk, was well covered in the charge of the Court, and further, it is faulty in eliminating the negligence of defendant in the methods of operating its cars.

Appellant claims error under its Assignment XV (Transcript, 662), and says the Court erred in instructing the jury, "That in order to relieve the defendant from liability on account of negligence, the negligent conduct of the plaintiff must be willful and wanton."

There was no such instruction given, which is a sufficient answer to this assignment of error.

Appellant, under its Assignment of Error XVI, claims that the damages assessed by the jury are excessive.

The question of excessive damages is for the trial court.

Texas & Pacific Ry. Co. vs. Behymer, 189 U. S. 469, 47 L. Ed. 905.

Southern Ry. Co. vs. Craig, 113 Fed. 79.

Western Gas Const. Co. vs. Danner, 97 Fed. (C. C. A. 9th Circ.) 883, 890.

In appellant's Assignment of Error XVII (Transcript, 662), it is claimed that the evidence is insufficient to justify the verdict of the jury. That question is not open for review in this court, because the assignment of error does not show in what particular. No evidence is set out, and the question was not raised in the lower court. Appellant did not,

at the close of all the evidence, move for an instructed verdict on any ground.

Appellant's Assignment of Error XVIII claims that the verdict is against the law. The assignment is too general to be considered. The error, whatever it might be, is not specified.

Appellant, under its Assignment of Error XIX (Transcript, 662), claims error, because on objection the Court excluded the deposition of Dr. Dietrich. This deposition was taken pursuant to a stipulation under the laws of the State of Arizona. The stipulation appears in the Transcript, 663, which especially reserves the right to object to the evidence, to wit: "*That the said deposition of said witness when so taken and returned may be read in evidence in this cause subject to the same objections and exceptions as if said witness were personally present on the stand.*"

Section 2525 of the Revised Statutes of Arizona of 1901 is applicable here, which is as follows:

> "2525. Depositions may be read in evidence upon the trial of any suit in which they are taken, subject to all legal exceptions to which might be made to the interrogatories and answers were the witness personally present before the Court giving evidence."

This deposition, or so-called deposition, is not in the bill of exceptions. It is not made a part of the bill of exceptions; it is not before Court for consideration. Before the Court could consider this deposition it must be in the bill of exceptions.

United States vs. Copper Queen Consolidated Mining Co., 185 U. S. 495, 498, 46 L. Ed. 1009.

The bill of exceptions must contain all the evidence sought to have reviewed.

Alaska Commercial Co. vs. Dinkelspiel, 126 Fed. (C. C. A. 9th Cir.) 164.

Boatmen's Bank vs. Trower Bros. Co., 181 Fed. (C. C. A.) 809.

Star Co. vs. Madden, 188 Fed. (C. C. A.) 910.

Even if respondent did submit some cross-interrogatories in the deposition of Dr. Dietrich, such, under said stipulation and laws of Arizona, would not preclude an objection on the ground of incompetency.

The Arizona statute on the feature of depositions was taken from Texas, and it is the rule there under the same statute that the deposition may always be objected to when offered in evidence on the ground of incompetency, and such appears to be the general rule in other States.

9 Ency. Law (2d ed.), 363, note 5.

6 Ency. Pl. & Pr. 596, n. 2.

Some statutes provide if a party appears personally and asks questions, without objecting to incompetency, that he thereby waives that right when the deposition is offered in evidence, but such is not the Arizona statute. The right to object on the ground of incompetency may always be taken advantage of when the deposition is offered in evidence. In the Dr. Dietrich deposition the respondent did not, nor

did anyone for him, appear and cross-examine that witness.

"The competency of a witness to testify can only be determined when his deposition is offered upon the trial, at which time the deposition stands for the witness."

Messimer vs. McCrary, 21 S. W. (Mo.) 17.

Incompetent testimony goes out on the trial under an objection on that ground (Griffith vs. McCandles, 59 Pac. [Kan.] 729), although the party objecting appeared and cross-examined the witness.

Rogers vs. Tompkins, 87 S. W. (Tex.) 383.

Attending physician's deposition is incompetent.

Epstein vs. Penn. R. Co., 122 S. W. (Tenn.) 370.

Ill. Cent. R. Co. vs. Panebiango, 81 N. E. (Ill.) 53.

Appellant assigns as Error XX (Transcript, 675), the refusal of the Court to grant a new trial. That matter is entirely discretionary.

Simpkins' Suit at Law, 126.

Manning vs. German Ins., 107 Fed. 52.

Respectfully submitted,

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W. M. SEABURY,

Attorneys for Defendant in Error.

No. 2259

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS P. CLARK,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This action was commenced by the defendant in error in the District Court of the Territory of Arizona on the 18th day of January, 1912, for damages alleged to have resulted from an accident on the 15th day of March, 1911. On the day of ....., 1912, this cause was transferred from the Territorial Court to the United States Court for the District of Arizona, on motion of defendant in error, under Section 62 of the Judicial Code (1911.)

At the date of the accident, and for several years prior thereto, the defendant in error was in the employ of plaintiff in error as Locomotive Engineer in charge

of its Switch Engine and on said date defendant in error was engaged in switching freight cars within the yard limits of the plaintiff in error in the town of Clifton. Twelve of these cars on the date of the accident were moved from one point to another within the yard limits, and left standing at the latter point, for the purpose of being switched to the Shannon Smelter on and over what is known as the Shannon Spur. The point at which the cars were left standing was on the main line south of the intersection of the Shannon Spur. The track at the point of intersection with the Shannon Spur and south on the main line is practically level; the grade from the Shannon Spur south for 846 feet, being sixteen one hundredths of one per cent (.16 per cent.) Defendant in error on the date of the accident assisted by the switching crew coupled his engine on to four of the cars left standing on the main line and switched them up to the Shannon Smelter over the Shannon Spur; returning from the Shannon Smelter he coupled his engine on to four of the eight cars left standing and pulled them north on the main line beyond the intersection of the Shannon Switch. In the meantime the four cars left on the main line without any known cause started to roll very slowly north and as defendant in error was backing up south over the main line at the rate of about six miles an hour, the four cars in front of his engine having passed on to the Shannon Spur, the cars left on the main line collided with his engine just as it was passing from the main line on to the Shannon Spur.

The method of plaintiff in error in its switching operations at this point for the past thirteen years had uniformly been to leave cars on the main line without the brakes being set, which method was known to defendant in error. Covering this period cars left standing on the main line had moved possibly once a few feet and stopped. No accident or injury had ever occurred by reason of this method of operation. Defendant in error had been in the employ of plaintiff in error as Locomotive Engineer for about thirteen

years; had charge of its switch engine daily for several years prior to this accident; was familiar with the method of operation in switching at this point; never complained of the manner or method of operation. The method was open and obvious and known and appreciated by him; in fact he admits in his testimony that he knew this uniform method of operation. Rec. p 187-188 folio.....)

Defendant in error after the transfer to the Federal Court filed an amended complaint setting forth practically the same facts alleged in his original complaint. On the.....day of ..... he filed a second amended complaint in which he alleged substantially the same facts set forth in his original and amended complaints. To the second amended complaint plaintiff in error filed an amended answer in which it interposed general and special demurrers; general denial; assumption of the risk; contributory negligence. The questions involved are as follows:

1st. The sufficiency of the complaint raised by a general demurrer (Rec. page 69-85.....folio .....) and by motion for directed verdict. (Rec. page. 198..... folio .....)

2nd. The sufficiency of certain parts of the complaint raised by special demurrer (Rec. page..70-71.. .85....folio.....).

3rd. The indefiniteness and uncertainty of said complaint and each count thereof by a motion to make more definite and certain (Rec. page. 60-85... folio.....)

4th. On the ground of duplicity by motion to strike plaintiff's second amended complaint from the files because each count thereof is duplicitious (Rec. page..64-67...folio ..85.....)

5th. The insufficiency of plaintiff's second amended

complaint was also raised by defendant's objection at the beginning of the trial to any evidence in the case on the ground that said amended complaint and neither count thereof alleged facts sufficient to constitute a cause of action. (Rec. page .108-109...., folio 85. 112-113....)

6th. The question of variance was raised by defendant at the close of plaintiff's evidence by a motion for a directed verdict. The facts alleged in the first and second counts of plaintiff's amended complaint are based upon the first section of the "Employers' Liability Act," approved April 22, 1908, in respect to injuries received by employees while engaged in interstate commerce, and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce at the date of the alleged injuries. The undisputed evidence in the case showing that plaintiff and defendant were engaged at the date of the alleged accident in switching cars in defendant's local yards at Clifton. It was conceded by plaintiff and the court that plaintiff and defendant were not engaged in interstate commerce at the date of the alleged injury and the court held that this fact was immaterial as under the 2nd Section of the Federal Employers' Liability Act plaintiff was entitled to recover by reason of the fact that Arizona was a Territory at that date. (Rec. page. 108.-109. folio 493....310..)

7th. The question of sustaining plaintiff's objections to and excluding the testimony of witness Kelly offered by defendant was raised by exception to the action of the court. (Rec. page..... folio..380-381.....)

8th. The question of sustaining plaintiff's objections to and excluding the testimony of witness

Kline offered by defendant was raised by exception to the action of the court. (Rec. page.316. . .347.....folio.....)

9th. The question of error in the Court's charge on the subject of the assumption of risk was raised by defendant at the close of the evidence before reading the general charge of the court to the jury. (Rec. page.617...493..folio.....)

10th. The question of error in that part of the Court's charge in reference to the rule of damages was raised by defendant objecting to the same before reading the general charge by the Court to the jury. (Rec. page....619..... folio.....)

12th. The question of error in that part of the Court's general charge in respect to the wilful conduct of plaintiff by exception duly made and allowed before the general charge of the Court including the part objected to, was read by the Court to the jury. Rec. page..491-620..... folio.....)

13th. The question of error on the subject of failure of plaintiff to obey signals given him to stop by the prompt observance of which he might have stopped his engine, must be wilful and intentional in order to exempt the defendant from liability for the alleged injury, by objection of defendant before reading the charge to the jury including that part objected to and before the jury had retired to consider their verdict. (Rec. page.494 .....folio.....)

14th. On the subject of the competency of the testimony of Dr. Stark, a witness offered by defendant, to prove the condition of plaintiff in respect to the injuries alleged to have been received at the

date of the accident and particularly as to the condition of plaintiff's eye about two months subsequent to the date of the alleged injury, by excepting to the action of the Court in sustaining the objections of plaintiff to the testimony of the witnesses. (Rec. page. 458.-476. folio.....)

15th. The question of the Court's error in refusing to give to the jury instructions offered by defendant was raised by defendant's exceptions to the action of the Court before the retirement of the jury. The instructions offered and refused by the Court will be found under defendant's Assignment of Error No. 15. (Rec. Page. 622-624. folio.....)

16th. As the error complained of under this Assignment is the same as that urged under No. 12, reference is hereby made to said number for authorities supporting the same. (Rec. page. 476.... folio.....)

17th. The question of damages being excessive was raised by defendant's motion for a new trial as error under paragraph 18 of its motion for a new trial. (Rec. page. 103..... folio.....)

18th. The question of the sufficiency of the evidence to sustain the verdict and judgment was raised by paragraph 18 of defendant's motion for a new trial. (Rec page. 108..... folio.....)

19th. The question of the verdict of the jury and the judgment of the Court being against the law was raised by defendant in paragraph 19 in its motion for a new trial. (Rec. page. 108..... folio.....)

20th. The question of the competency of the testi-

mony of Dr. Deitrich whose deposition was offered in evidence on the part of defendant was raised by defendant in its exception to the order of the Court excluding said deposition. (Rec. page 664-670 folio.....)

The demurrers were over-ruled; the several motions by the Court denied (Rec. page..... folio.....). The trial resulted in a verdict and judgment in favor of defendant in the sum of $12,675 ..... motion for new trial filed and over-ruled and the cause is in this court for review on writ of error.

ASSIGNMENT OF ERROR NO. 1.

The Court erred in over-ruling defendant's General Demurrer to the second amended complaint for the reason that said complaint nor neither count thereof, stated facts sufficient to constitute a cause of action. As the same objection was urged in defendant's motion for judgment under assignment of error (No. 5) made before the introduction of any evidence in the cause. Rec. page..69-108.. folio..... (We shall consider them together.)

It is fundamental that in order to state facts constituting actionable negligence, some duty of the master must be alleged, its violation and resulting injury to the servant.

McAndrews vs. Chicago L. S. & E. Ry. Co. 78 N. E. 603.

It is also a familiar principle of the law covering the relation of master and servant "that the limit of the master's duty is to exercise ordinary and reasonable care having regard to the hazards of the service, to provide his employees with reasonably safe appliances, machinery, tools and working places, and to exercise ordinary care to keep them in reasonably safe condition of repair."

Choctaw & G. R. Co. vs. Holloway, 114 Fed. 458.

In this case Judge Sanborn, speaking for the Court, after stating the duties of the master, states the rule in respect to the servant as follows:

> "A servant may assume that his master has discharged this duty, unless he knows, or by the exercise of reasonable care he would have known, that the duty had not been discharged, and that there were defects in the machinery and appliances with which or in the place in which he undertakes to work. On the other hand the servant assumes all the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a person of ordinary prudence and care by the exercise of ordinary diligence. It is his duty to exercise reasonable diligence, to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working; and he assumes the risks and dangers of all such defects of which he has knowledge, and of which he would have had knowledge, by the exercise of ordinary care and dilligence."

This case was affirmed by the Supreme Court of the United States. 191 U. S. 334.

And the principles announced is the law of this case unless changed or modified by Section 4 of the Employers' Liability Act (1908), which provides that an employee shall not be held to assume the risk of his employment in any case where the violation of such common carrier of any statute enacted for the safety of the employee contributed to the death or injury of said employee, and as it is not contended in this case that the injury complained of resulted from the viola-

tion of any statute enacted for the safety of the employee, the assumption of the risk remains as at common law.

Neil vs. Idaho and W. N. R. Ry. 125 Pac. 231, 236.

Under this rule the servant by the terms of his employment agrees, expressly or impliedly, that the dangers obviously incident and those which he knows, or could have known by the exercise of reasonable care are at his risk. As said by Judge Taft, speaking for the Court of the 6th Circuit:

> "Assumption of risk is a term of the contract of employment, express or implied, from the circumstances of the employment by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the aquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; *but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume.*"

Narramore vs. Cleveland C. C. & St. L. R. Co. 96 Fed. 298.

Chespeake & O.R. Co. vs. Hennessey 96 Fed. 413.

St. Louis Cordage Co. vs. Miller 126 Fed. 492.

Schlemmer vs. Buffalo R. P. & R. Ry. Co. 220 U. S. 590.

The first question presented is whether the ob-

jections can be raised by general demurrer, or motion for directed verdict. While the authorities agree that the assumption of the risk is a defense, yet it is well established, and sustained by text writers and decisions both Federal and State, that no cause of action accrues to the servant for injury resulting from risks assumed. For the reason that the master violates no duty in failing to protect him from such risks and dangers. Hence to state a cause of action in personal injury cases, it is essential that it should be averred that the servant had no knowledge of the risks or dangers. For the reason that if he did know and voluntarily remained in the service, he is deemed to have assumed the risks as incident thereto.

The plaintiff in his amended complaint alleges defendant had actual knowledge of the conditions at date of the accident. But he fails in said complaint to allege want of knowledge actual or constructive on his part.

In order to state a cause of action alleged to have been caused by carelessness and negligence of the master, it must be shown affirmatively that the master was in possession, or might by the exercise of ordinary care have been in possession of knowledge of the dangerous character of the work, *which knowledge was unknown, and by the exercise of ordinary care, prudence and intelligence on the part of the employee could not have been known to him.*

Thompson vs. Chicago M. & St. P. Ry. Co. 18 Fed. 239.

In the case of Dixon vs. W. U. Tel. Co. 68 Fed. 630, Mr. Justice Baker, on the subject of complaints in personal injury cases states the rule in the following language:

> "A complaint in an action for personal injuries resulting from insufficiency or unsafe condition of the appliances furnished by

> the employer to his servant, *which does not allege that such insufficiency was known, or might have been known to the employer, and was unknown to the servant is fatally defective.*

The same principle is announced and sustained in the case of Bohn Mfg. Co. vs. Erickson, 55 Fed. 493.

The Supreme Court of Indiana in a very recent case decided February 13th, 1913, on the subject of pleading in accident cases uses this language:

> "In an action for injury or death of a servant, the complaint *must aver facts showing that the servant did not assume the risk of danger.*"

Standard Cement Co. vs. Minor, 100 N. E. 767. (Advance sheets N. E. Rep. March, 11, 1913.)

The Supreme Court of Idaho in the case of:

Minty vs. U. P. Ry. Co. 21 Pac. 660, in passing upon the question of pleading in this class of cases uses this language:

> "He (servant) must show the injury did not arise from a defect obvious to himself, or which by the use of ordinary care, *he might have known.* Before the servant can recover he must show it was *not from hazard incident to the service.*"

The Supreme Court of Illinois, in a recent case lays down the rule of pleading in accident cases in the following language:

> "The duty and liability are the same with regard to the place of work and the appliances with which the work is done; and the

rule is that the servant, in order to recover, must establish three propositions:

First the existence of the defect; second, that the Master had notice thereof, or in the exercise of ordinary care would have had knowledge of it; *and third that the servant did not know of the defect,* and had not equal means of knowing with the master."

Lake Erie & W. R. Co. vs. Wilson, 59 N. E. 573.

The Supreme Court of Indiana in the case of:

Salem Bedford Stone Co. vs. Hodds 42 N. E. 1022; lays down the rule on this subject as follows:

"Another rule, now firmly established is that, where the servant knows of the defect in the machinery, or the danger in the place where he is working, ********** or the want of skill of fellow servants, and with such knowledge voluntarily continues in such employment, he thereby exonerates the master from liability and is held to have assumed the risks incident to such defects, dangers, or want of skill. Out of this rule has necessarily grown the conclusion that the action for a violation of the employer's duty, envolves more than mere negligence, and contributory negligence, *and includes a denial of the assumption of the hazard. A failure to negative the assumption of which renders the complaint bad."*

Dixon vs. W. U. Tel. Co., 68 Fed. 630.

Bethleham Iron Co. vs. Weiss, 100 Fed. 45.

Glavin vs. Boston & M. R. R., 100 N. E. 614 (advance sheets N. E. Rep. Feb. 15, 1913.)

Peterson vs. New Pittsburg Coal & Coke Co. 49 N. E. 8.

Mr. Clark in his testimony in answer to following question:

"So far as you know during the two years you were engineer on the switch engine were the brakes set upon the cars left standing on the main line before being switched up the Shannon switch?"

To which he replied:

A. "So far as I know there was not any brakes set on them at all."

Q. That was true during entire two years that you had charge of the switch engine?

A. Yes, sir. (Rec. p. 188).

The Supreme Court of Massachusetts in the case of Glavin vs. Boston & M. Ry. 100 N. E. 614 (advance sheets Fed. Rep. Feb. 19, 1913) uses this language:

> "Where an employee's testimony showed that he fully understood the danger of his employment the employer could not be held liable for failure to give further warning or instructions concerning such dangers."

Second amended complaint of plaintiff tested by the rule established by the authorities cited is fatally defective in failing to state facts sufficient to constitute cause of action and we respectfully submit the Court erred in over-ruling defendant's general demurrer to said complaint and each count thereof and in denying defendant's motion for a directed verdict.

ASSIGNMENT OF ERROR NO. 2.

The Court erred in over-ruling defendant's special demurrer to that part of plaintiff's second amended complaint beginning on page 3 with the words "that portion of defendant's said Railroad track" and ending with the words "an injury hereinafter mentioned" for the reason that the same is a conclusion; simply an opinion of the pleader.

The Court also erred in over-ruling defendant's

special demurrer to that part of plaintiff's second amended complaint on page 4 beginning with the words "that plaintiff's said injuries were also caused by the insufficient number of brakemen to manage said cars; the said Railroad bed was defective and unsafe; that said brakes on said cars and coupling apparatus was out of repair and unsafe; that defendant did not inspect its road bed and said cars and did not furnish plaintiff a reasonably safe place in which to perform said work and that defendant and its said servants so negligently and carelessly ran, managed and operated said freight cars and engine whereby said collision was caused and plaintiff injured as aforesaid," for the reason that no facts are alleged showing negligence upon the part of defendant, same being merely a conclusion of law and the opinion of the pleader.

Mobile Savings Bank vs. Board of Supervisors, 22 Fed. 580.

James vs. City Investing Co., 188 Fed. 513.

ASSIGNMENT OF ERROR NO. 3.

The court erred in over-ruling defendant's motion to make said complaint and each count thereof more definite and certain in to respect the number of brakemen employed by defendant was insufficient, and how said insufficiency; if any, caused or contributed to plaintiff's alleged injury, in what respect the road bed was defective and unsafe and how said defective and unsafe road bed, if any, caused or contributed to the cause of plaintiff's alleged injury; in what respect was the coupling apparatus out of repair and unsafe and how said want of repair or unsafe condition contributed or caused the alleged injury; in what respect defendant failed to furnish plaintiff a safe place in which to perform his work and how such unsafe place, if any, caused or contributed to cause plaintiff's alleged injury and in what respect defendant and its servants negligently and carelessly ran, managed and operated its cars and

engine and how such careless and negligent operation, if any, caused or contributed to cause the alleged injury.

The courts of the United States are governed and controlled by the course of procedure of Civil causes adopted by the Courts of the State, unless such procedure is in conflict with Section 912. Rev. Statutes of the United States.

Rev. Statutes of Arizona, 1901, No. 1356 provides as follows:

> "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion, and when a pleading is double, and does not conform to the statute, or when allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may strike it out on motion or require it to be amended."

In defendant's motion to make more definite and certain the Court's attention was particularly directed to the indefinite and uncerain allegations in respect to the number of brakemen employed by defendant at the date of said accident. Said indefinite and uncertain statement beginning with the words "plaintiff further says" and ending on page 7 with the words "and plaintiff injured as aforesaid." Also to the indefinite and uncertain statement in respect to brakes and coupling apparatus on the cars and in respect to the indefinite and uncertain statement that the brakes and coupling apparatus were out of repair and unsafe and to the further indefinite and uncertain allegation that defendant failed to discharge its duty in respect to the inspection of the cars and to the further indefinite and uncertain statement in respect to the unsafe road bed and the further indefinite and uncertain statement in reference to the defendant's failure to furnish plaintiff with a safe place in which to perform his work and

the further allegation in reference to the negligent and careless management and operation of its cars the date of the accident. Paragraph 1289 R. S. Ariz. 1901, provides as follows:—

> "The complaint shall set forth clearly the names of the parties, a concise statement of the cause of action, without any distinction between suits at law and in equity, and shall also state the nature of the relief which he demands."

The legal conclusions which are simply the opinion of the pleader violates this express command of this paragraph of our Statute and under paragraph 1356 above cited a remedy is provided for the correction of pleadings defective in this respect.

In support of the position of plaintiff in error that the several allegations specifically pointed out in defendant's motion to make more definite and certain are indefinite and uncertain and conclusions of law and opinions of the pleader, we cite the following cases:—

Mallory vs. Globe Boston C. M. Co. 11 Ariz. 296;

Mobile Savings Bank vs. Board of Supervisors, 22, Fed. 580;

Florence Oil & Refining Co. vs. Farir, 109 Fed. 254;

Southern Pac. Ry. Co. vs. Campbell, 189 Fed. 182;

In re Dunn 181 Fed. 701;

School Dist. No. 2 vs. Shuck, 113 Pac. 511;

Kirkpatrick vs. City of Dallas, 115 Pac. 424;

Stratton's Independence Ltd. vs. Sterrett, 117 Pac. 351;

Allen vs. Cooley, 31 S. W. 630;

Tel. Co. vs. Patterson, 1st Nev. 150;

Leitham vs. Cusick, 1st Utah, 224;

Kenney vs. Turner, 15 Ill., 182.

Allegations in pleadings that the acts averred were "rightful" or "wrongful," presents no issue of fact and creates no legal liability. They are the expressions of the opinions of the parties with respect to their legal rights.

The facts relied upon to constitute negligence must be pleaded:—

Rutheford vs. Foster, 125 Fed. 187;
Hieronymus vs. N. Y. Nat. Bldg. & Loan Ass'n, 101 Fed. 12;
Picotte vs. Watt, 31 Pac. 805;
Griffith vs. Wright, 58 Pac. 582;
Fogg vs. Ry. Co., 23 Pac. 840;
Webber vs. Dillon, 54 Pac. 894;
Carlile vs. People, 59 Pac. 48;
Callahan vs. Broderick, 56 Pac. 782;
People vs. Cobb, 51 Pac. 523;
Gould vs. Railway Co. 1st Otto 526-416.

A motion to require a complaint to be made more definite and certain will be sustained even though the complaint may be sufficient as against a general demurrer.

Southern Elec. Ry. Co. vs. Hageman, 121 Fed. 262.

Conclusions of law express merely the opinion of the pleader.

Grand Val. Irr. Co. vs. Lesher, et al., 65 Pac. 44.

Conclusions are not facts.

Heber vs. Dillon, 54 Pac. 894.

The allegation that the "road bed was defective and unsafe" and the allegation that "the grade was so steep that cars would not stand without being blocked or the brakes set" are mere conclusions of law.

Mobile Savings Bank vs. Board 22 Fed. 580.
City of Logansport vs. Kihm, 64 N. E. 595;
City of Buffalo vs. Holloway, 7 N. Y. 492.

Facts from which duty springs must be alleged.

Anthony vs. Waters, 62 N. E. 505;
History Co. vs. Dougherty, 3rd Ariz. 387.

For the reason that the several allegations in plaintiff's second amended complaint were indefinite and uncertain defendant's motion to make more definite and certain should have been sustained.

ASSIGNMENT OF ERROR NO 4.

The Court erred in over-ruling defendant's motion to strike plaintiff's second amended complaint from the files, because each count thereof is a duplication, in this that thirteen separate and definite causes of action are alleged in each of said counts involving defendant's liability under the common law and two Federal Statutes, one, the "Safety Appliance Act" and the other "Federal Employees Liability Act," each of said alleged causes of action requiring different proof and to each of said causes of action separate and distinct defenses may be interposed and as to said second count because the several and distinct causes of action therein alleged are merely a summary of the several causes of action alleged in said first count. As to the second count the motion to strike should have been sustained for the reason that the facts alleged are a mere summary of those set forth in the first count of the complaint. The rule is that where the facts alleged in the second count requires neither more nor less evidence to establish it than to establish the cause stated in the first count, that it is duplication, hence defendant's motion should have been sustained.

Lighter vs. Jackson, 35 .N. E., 289.

Duplicity is defined a joinder of different grounds of action in the same count to enforce a single right.

Devlicco vs. C. Vt. R. Co., 20 Atl. 953.

The Statutes of Arizona (1901) Paragraph 1356, provides that when the pleading is double, that it states several different causes of action in one count, the court may strike it out on motion or require it to be amended. This is the uniform rule in the Code States:

Pomeroy Code Rem. (1904 Ed.), Sec. 446, page 611;

Also see case cited Note 1, page 612;

Green vs. Hereford 12 Ariz. 85.

The supreme court of Arizona recognizes separate and independent causes of action and permits the same to be alleged in different counts.

Williard vs. Corrigan 8th Ariz. 70.

Chief Justice Street in delivering the opinion of the Court uses this language:

> "The plaintiff may set forth the same single cause of action in varied counts, and with differing averments, so as to meet the possible proofs which will for the first time fully appear on the trial * * * The complaint contained two counts; one alleging a promise to pay, and the other alleging a quantum meruit."

Vendicato Cons. Gold Mining Co., vs. Firstbrook, 86 Pac. 313.

Rutledge v M. Pac. Ry. 19 S. W. 38.

The Supreme Court of Montana in passing upon

this subject, held in the case of Ramsdell vs. Clark, 49 Pac. 591.

> A complaint avering that defendant had leased a certain mine from plaintiff,and alleging, as a first breach, that defendant had worked the mine for six months, but had failed to pay over half of the net proceeds, as provided by the lease, and, as the second breach, that he had failed to work the mine in a workmanlike and substantial manner, and, as the third breach, that defendants had failed to work the mine at all after six months, sets forth three separate and distinct causes of action were alleged in the same cause.

Laport vs. Cook 38 A. T. L. 700;
Merrill vs. Derring, 22 Minn. 376;
Toledo & N. Ry. Co. vs. Daniels, 21 Ind. 256.

Separate paragraphs, separately numbered, is of itself not sufficient to determine their character as separate and distinct counts.

Merrill vs. Deerring, 22 Minn. 376.

The proper remedy where several causes of action are co-mingled is by motion to strike:—

Fox vs. Rogers, 59 Pac. 538;
Heberlaw vs. Lake S. & M. S. Ry. 73 Ill. App. 261;
Massenbecker vs. L. S. & M. S. Ry. Co., 42 Atl 67.
Union Pac. Ry. Co. vs. Wiler, 158 U. S. 285.

Judge Deady in the case of McKay vs. Campbell, 1st Sawyer, 374 (Fed. cases No. 8, 839), in passing upon this question uses the following language:

"Duplicity in pleading is forbidden by both the common law and the Code as tending to prolixity and confusion, but under the Code objection to duplicity is to be made by a motion to strike out the pleading rather than by special demurrer as at common law." He further says in his decision in this case:—

"If a complaint contains more than one cause of action they must be separately stated or it will be liable to be stricken out for duplicity."

This was an action to recover a penalty under the act of Congress, for refusing an elector the right to vote. The complaint contained but one count and alleged therein that the defendant in refusing and wrongfully preventing plaintiff from voting for representative in Congress and for other said officers and for sheriff of the county and other county officers; held to state three separate and distinct causes of action that should have been separately stated and plead separately so as to avoid prolixity and confusion necessarily resulting from jumbling them together in one count.

Thorsen vs Babcock, 36 N. W. 723:
Thompson vs. K. M. Livery Co. 113 S. W. 1128 (214 Mo. 487).
Yazoo Ry. Co. vs. Wallace, 43 S. W., 369;
Bank vs. Bolong, 40 S., W. 411.

Bank vs. Ill. Cent. Ry. Co. 196 Fed. 171. (This was an action under the Federal Employees' Act, 1908)

ASSIGNMENT OF ERROR NO .6.

The Court erred in denying defendant's motion for a directed verdict at the close of plaintiff's evidence as follows:

"Mr. McFarland: We desire at this time to

make a motion and now move the court to direct a verdict for the defendant on the ground that it is not shown at the date of the accident that the defendant nor the plaintiff were engaged in interstate commerce. The uncontradicted testimony in the case is that the plaintiff and the defendant were engaged in switching cars on the tracks—the main line and side tracks— of the defendant within its yards; that the injury is alleged in the complaint to have occurred on the 15th day of March, 1911, while the plaintiff and defendant were engaged in interstate commerce.

The Court: You think, assuming that you are right in that question of law, do you think the complaint may not be sustained—I mean that this case may not be given to the jury upon the issue as to whether this defendant was a common carrier?

Mr. McFarland: I don't think so.

The Court: I know but doesn't it also imply; the very allegation with reference to its interstate commerce business imply that it was a common carrier. They have alleged more than they needed to. But assuming that it was a common carrier and assuming that the necessary effect of the allegations in the complaint to be that the defendant was a common carrier and that the accident occurred at the time we were a territory?

Mr. McFarland: Does Your Honor claim that the mere fact that the railroad company is a common carrier would give jurisdiction under the Federal Employers' Liability Act?

The Court: So long as it were a territory.

Mr. McFarland: But independent of that fact?

The Court: No it would not.

Mr. McFarland: Unless it was interstate commerce?

The Court: That is true.

Mr McFarland: The Court will have to take judicial notice that we were a territory, though it is not alleged.

The Court: I think I may do that. I don't think it even has to be proven or alleged. The Court

will take judicial knowledge of the change of political status. The motion will be over-ruled.

Mr. McFarland: To which we except."

(Rec. p. 310 - 316...folios.....)

For the reason that the cause of action, if any, as alleged in the first and second counts of his said amended complaint is based upon the first section of the Employers' Liability Act, approved April 26th, 1908, in respect to injuries received by employees while engaged in interstate commerce and the evidence at the close of plaintiff's case failed to show that defendant and plaintiff were engaged in interstate commerce the date of the alleged injury. The undisputed evidence in the case shows that plaintiff and defendant were engaged at the date of the alleged action in switching cars in its Railroad yards at Clifton. This is intra state commerce.

Erie Ry. vs. United States, 195 Fed. 287.

It was conceded by plaintiff in error at the conclusion of his evidence at the trial of this cause that plaintiff and defendant were not engaged in interstate commerce at the date of the alleged accident and injury and the Court in its decision on the motion of the plaintiff for a direct verdict conceded that plaintiff and defendant were not engaged in interestate commerce at the date of the accident and injury, but held that it was immaterial as under the 2nd Section of the Federal Employees Liability Act plaintiff was entitled to recover by reason of the fact Arizona was a territory at that date and plaintiff could recover regardless of the fact that the action was based upon the negligence of the defendant while engaged in interstate commerce. It is a familiar principle that the plaintiff must recover, if at all, upon the cause of action alleged; that he cannot allege one cause of action and recover upon another.

> "The general rule is that a complaint must proceed on a distinct and definite theory

and on that theory the plaintiff's case must stand or fall."

Gallious vs. Sandvoal, 106 Pac. 373.
Chicago St. L. & P. Ry. Co. vs. Bills, 3rd N. E. 615.

The rule on this subject is—

"A plaintiff must recover according to the allegations of his complaint or not at all."

Thompson vs. Citizen's St. R. Co. 53 N. E. 462.
McMahan vs. Canadian Pac. Ry.Co.,66 Pac. 708;
So. Kan. Ry. Co. vs Griffith, 38 Pac. 478;
Pomeroy's Code Rem. (4th Ed.) Sec. 447 (553) and cases cited in Note 2, page 614.
U. P. Ry. Co. vs. Wyler, 158 U. S. 285.
Seymour vs. Franklin, 92 Fed. 122.
Metropolitan Life Ins. Co. vs. Hartman, 174 Fed. 801

Union Cas. Sur. Co. vs. Bragg 65 Pac. 272.
Johnson vs. State Bank, 52 Pac. 860.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in sustaining plaintiff's objection to and excluding the testimony of witness Kelly offered by the defendant by whom defendant proposed to show the carelessness of plaintiff in handling his engine and disobeying signals while operating his engine in switching cars in the yards of defendant, to sustain plaintiff's carelessness and negligence, defendant propounded to witness the following questions and the witness made answer thereto as follows:

Q. How long has Mr. Clark been operating that engine in switching cars in that yard?

A. Well, I think up to that time about two years Mr. Clark had been on that engine, around about that

time, as regular engineer—what we call regular man on the engine.

Q. Do you know whether he is a careful or negligent man—engineer—in the operation of his engine in switching cars?

Mr. Seabury: We object to the question as incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Mr. McFarland: We except to the ruling of the Court.

(To the witness.)

Q. Do you know of any instances prior to the accident, and within the space of two years, where he was negligent and careless in the operation of his engine in respect to obeying signals?

Mr. Seabury: We make the same objection.

The Court: Same ruling.

Mr. McFarland: We except. Now, if the Court please, we offer to prove by this witness that Mr. Clark for two years previous to this injury by this accident was habitually careless and negligent in obeying signals given him while operating his engine in switching cars in the yards of the defendant. We offer further to show by this witness that in many instances which occurred possibly almost daily within two years previous to the happening of this accident that he uniformly and habitually disobeyed signals given to him as engineer in the operation of his engine and this train while switching in these yards.

Mr. Seabury: We object to the offer and again respectfully protest against its being made and ask that it be excluded.

The Court: The ruling made will stand:

Mr. McFarland: It is denied?

The Court: Yes.

Mr. McFarland: To which we except.

Rec. page 380, 381.

ASSIGNMENT OF ERROR NO. 8

The Court erred in sustaining the objection of plaintiff to and excluding the testimony of witness Kline offered by defendant, by whom defendant proposed to show the general reputation of plaintiff as a safe and conservative engineer or as to his general reputation as a careless, reckless engineer. For the purpose of eliciting this testimony, defendant propounded to witness the following questions to which the witness made answer thereto as follows:

Q. You say you have known Thomas Clark how long.

A. About fifteen or sixteen years.

Q. At Clifton?

A. No. I knew him in the Indian Territory.

Q. How long have you known him in Clifton?

A. A little over twelve years.

Q. Do you know his general reputation as to being a safe and conservative engineer or as to his reputation of being a reckless engineer in the operation of his engine?

Mr. Seabury: We object—it is clearly incompetent and inadmissable.

The Court: I sustain the objection.

Mr. McFarland: We except to the ruling of the Court.

(to the witness.)

Q. Do you know whether his methods and mode of operating his engine is of a safe and conservative character—I withdraw that—whether his mode of operating his engine in the yards of the Company in switching cars is careful, or whether his method and mode of operating his engine in switching cars in the yards of the Company is reckless and careless?

Mr. Seabury: We make the same objection, and we further object to the repeated offer of evidence which counsel must know to be incompetent, solely for the purpose of putting such inferences into the jury's mind —that constitutes reversible error.

Mr. Kibbey: We think that that statement is entirely uncalled for—we think this is competent evidence.

Mr Seabury: We can't conceive of that being competent evidence.

The Court: Upon what theory do you think it is competent.

Mr. McFarland: On his method and mode of operating his engine—he said he was careful.

The Court: Careful in that particular instance?

Mr. McFarland: Generally.

The Court: I don't recollect that he was asked as to that.

Mr. McFarland: That goes to the question as to whether he was a careful, painstaking operator with his engine, or whether he was a careless and reckless man.

The Court: Suppose he was careless and reckless —you seek to establish something from which it may be inferred in hiring him or suffering him to work so as to injure the lives of other workmen; but as establishing whether in a particular instance a workman was careless or otherwise, I know of no instance where proof of general reputation of that is admissable.

Mr. Bennett: Possibly not general reputation, but I understand he worked with Mr. Clark in the same switching crew and that he did know of his usual and general conduct in reference to switching and in handling his engine.

The Court: I should think as far as the matter could go in that way would be to admit proof of instances of like omissions to take the ordinary methods of caution, but not his impression—not his opinion—as to that matter.

Mr. McFarland: Note our exception.

(to the witness.)

Q. Do you know of Mr. Clark's habits—I withdraw that. Do you know whether as a general rule Mr. Clark obeyed signals or whether he ignored signals?

Mr. Seabury: We object to the questions as incompetent, irrelevant and immaterial.

The Court: I think the objection is equally good to that question.

Mr. McFarland: We except.

(to the witness.)

Q. Do you know of instances where Mr. Clark disobeyed signals?

Mr. Seabury: We object to that question also. The issue here is not whether Mr. Clark was careless about obeying signals.

The Court: Suppose the evidence be conflicting on that point? Suppose, assuming that the evidence indicates—the evidence put in by the defendant here indicates—that he didn't respond promptly to the signal to stop or didn't cut off the steam. Now there is an issue of fact. Would it not, under that circumstance, be competent to show that in other instances the defendant was likewise slow to respond to the signal, or careless?

Mr. Seabury: We think not. Assume for the sake of argument that he was careless—careless on other occasions—yet on the occasion of the injury he might have been proceeding with care.

The Court: Would it lend anything to the probability of the case?

Mr Seabury: We think not, and contend it is absolutely incompetent to receive such evidence, even assuming that they have it to produce, which we do not concede.

The Court: The individual element—the human element—is a factor in all these matters—some men are slow or quick to respond to signals of danger. Now, how is the jury to determine which of these contributing theories of fact is the true one unless they have all the light that can be thrown on that including the individual factor?

Mr. Seabury: We want them to have all the light that can be thrown upon the issue here. We say all that light comes from the evidence of these witnesses

as to what took place on this occasion, and that can be the only test.

The Court: But suppose those witnesses are sharply conflicting?

Mr. McFarland: Yes sir, a fact from which the jury may infer whether this was careless and reckless or not.

Mr. Bennett: It seems to me the evidence is admissable in this view of the matter. Mr. Clark testified as also did Mr. Chambers, the fireman, that immediately on receiving the washout signal he shut off the steam and applied the air. The witness now on the stand testified that it was impossible for him to testify that that was true, but he did testify that the exhaust was working when the engine reached the place of collision, which if true, contradicts the statement of Mr. Clark that he shut off the steam. Now, in order then that the jury may determine which of these facts are true, the usual, habitual conduct of Mr. Clark in the operating of his engine or his usual and habitual manner of operating his engine in such yards would be illustrative and would enable the jury to determine which would be the most likely to be true.

The Court: Possibly if this witness knows of instances of carelessness that might go to the jury, but I doubt whether his opinion as to whether he is a safe operator is competent evidence. I don't know of any instance where one workman was permitted to state his opinion as to whether the other fellow was a safe workman or not, whether he had that reputation or not, unless that be the issue, as, for instance, whether the employer was negligent that he was careless and reckless in this particular instance?

Mr. Seabury: Then it is for the jury to determine.

The Court: Then may they not consider which the more probable theory?

Mr. Seabury: That may be true, but we say they may not consider which is more probable if it is based

on evidence which is not competent because it does not relate to the matter involved.

The Court: But Mr. Clark was there—he was the actor in the matter. Suppose his hearing or sight was bad and sharp hearing or sight had something to do with his conduct, would it not be admissable to show his defective hearing or acuteness of sight or defective sight or acuteness of hearing as the case may be?

Mr. Seabury: We think not, and we say further in answer to that that if he had any defective sight or hearing it was the duty of the defendant to discover it.

Mr. Kibbey: He can't complain of that.

The Court: This evidence is only admissable on the theory that it shows contributory negligence.

(Thereupon the question is argued further to the Court, the further argument not being taken down by the reporter.)

Mr. Seabury: There is another ground of objection. Any question however framed, calling for other acts, practically asks the witness to state whether he exercised care on those occasions or not—the question is practically did he exercise care on other occasions.

The Court: I am in doubt about it. The objection will be sustained. I think it is safer.

Mr. McFarland: We except. Now, I desire to put the question a little more definitely so as to get it into the record in better shape.

The Court: You may do so.

By Mr. McFarland:

Q. Do you know of any instances on other occasions previous to this accident where Mr. Clark failed or refused to obey signals given him?

Mr. Seabury: We make the same objection.

The Court: The objection is sustained.

Mr. Kibbey: May we, in order to preserve our exception, state what we desire to prove?

The Court: I think it is already apparent. The argument has developed that.

Mr. McFarland: If there is any doubt about it we would like to state it.

Mr. Seabury: We object to the statement of what they desire to prove, and ask that counsel put their question to the witness. I shall object to any offer made for the purpose of a bill of exceptions.

The Court: I think this conference is absolutely unnecessary. I think if a bill of exceptions is necessary to be prepared in this case the court can find upon the record here enough without stating—repeating the statements—to put into the bill of exceptions to indicate the purpose of the offer. That is all you desire. Rec. p. 344 - 351 .. folio. 631 - 633 .....

As assignments of error No. 7 and 8 envolve the same question they will be considered together. One of the issues in this case was the care of the plaintiff and any evidence showing or tending to show want of care was material.

The general reputation of the servant for care and skill may be shown. This general reputation is shown by proof of specific acts.

Frasier vs. Penn. Ry. Co. 38 Penn. St. 104.

Carnegie Steel Co. vs. Penn. Ry Co. 173 Penn. St. 104.

Lakeshore & M. S. Ry. Co. vs. Stupak, 23 N. E. 246.

ASSIGNMENT OF ERROR NO. 9.

That the court erred in that part of its charge limiting and qualifying the general rule of the assumption of the risk as follows:

"But that principle of assumption of risk does not apply unless the danger is one that is so open and obvious as to be readily observable by a person of ordinary intelligence in his situation by the exercise of his powers of observation so far as consistent with his duty as such employe. Another condition affecting the doctrine of assumption of risk is that the plaintiff must not only have seen the dangers but also have appre-

ciated them. In determining this question, you have a right to take into consideration the nature of the employment the plaintiff was engaged in, and whether the duties of such employment prevented the plaintiff from making a close inspection, his opportunity to observe and take notice of the dangers of his employment at the time injured, and whether or not his opportunity for making such close inspection of the dangers was in any way affected by his other duties, and whether the requirements of his service as such engineer also affected his capability of comprehending the dangers which might otherwise have been more plainly visible to one not so engaged.

Now, to the doctrine of assumption of risk, it should be added that if certain of the dangers or dangerous conditions attending the work were so open and apparent that the plaintiff could be held to assume the risk under the rule I have stated, but if there were other dangers not open and visible, and but for this latter class of dangers the injuries would not have happened then the fact that he is chargeable with the assumption of risk in a portion of the dangers would not prevent recovery if the dangers with which he is so chargeable would not in themselves have produced the injury.

To the doctrine of the assumption of risk should be added the further qualifications that the plaintiff did not assume the risk of any danger which arose in whole or in part from the negligence of any officer, agent or employe of the defendant."

That the Court erred in that part of its charge limiting the assumption of risk by the employe to defects in works or dangerous conditions and excluding therefrom the obvious risks of dangerous operation and because the same imposes the burden of proof upon the defendant that the danger, if any, was one of those that the law declares plaintiff to have assumed.

The rule of law supported by the decided weight of authority on this subject is:—

"The servant assumes all the ordinary

risks of the employment which are known to him and which would have been known by the exercise of ordinary care to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and working place; and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him, or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation."

Choctaw O. & G. R. Co. vs. Holloway, 114, Fed 458.

The part of the charge complained of violated this rule in limiting the risks assumed to open and obvious risks and excluding from the consideration of the jury other risks and hazards which were known to plaintiff or which would have been known to him by the use of ordinary care to a person of reasonable prudence and diligence in his situation.

The Court in this part of its instructions assumes that there is only one class of risks assumed by plaintiff, that is those that are open and obvious, which violates the rule that servants assume other risks incident to the service which he knew or may have known. There is only one escape for the servant who remains in the service of the master with an actual or constructive knowledge of defects of place and operation and that is where he complained of the hazard incident to risk and the master promises to repair, he may remain a reasonable time under this promsie to enable the master to fulfill his promise. This is the only exception to the doctrine of assumption of the risk. As there is no pretense in this case of any request by the servant or promise by the master the unquestionable weight of authority is that if he remains in the service of the Company with the

knowledge, actual or constructive, he assumes the risk and cannot recover.

Notthoff vs. L. A. Gass Co. 118 Pac. 436.
C. B. & Q. Ry. Co. vs. Shalstrom, 195 Fed. 725.

ASSIGNMENT OF ERROR NO. 10.

The Court erred in that part of the general charge to the jury as follows:

> "If the plaintiff be guilty of contributory negligence, and his negligence and that of the defendant company be equal, the jury will give an award of one half the damages it would have given if he had been free from negligence; or if he be twice as negligent as the defendant company, then one third would be the proportion of the damages he shall receive, and so on, whatever the proportion may be."

Because this instruction invaded and usurped the province of the jury in determining the question of damages. Mr. Thornton in his recent work on the Federal Employer's Liability Act, on the subject of apportionment of damages under this law lays down the rule on this subject as follows:

> "It is true the Court can not lay down rigid rules for the apportionment of damages in a particular case. This is a fact that must be left to the jury, practically without direction."

Thornton Federal Employer's Liability (1912 Ed.) p 141, Sec. 88.

ASSIGNMENT OF ERROR NO. 11.

The Court erred in that part of its charges as follows:

> "That is subject to the qualification, that if the contributory negligence or the negligence of the plaintiff was so *wilful* and of such character as the jury might say that it was the direct cause of the injury, then the plaintiff could not recover by reason of such negligence."

This part of the Court's charge is error for the reason that it in effect told the jury that negligence on the part of the plaintiff, that would defeat his recovery must have been intentional, voluntary, purposely, in other words the result of present or premeditated design.

This instruction violates the universal rule on the subject of contributory negligence. "Contributory negligence" that will bar a recovery for injury by the plaintiff is such negligence as amounts to an absence of *ordinary* care on the part of the plaintiff."

Johnson vs. International & G. N. R. Co. 57 S. W. 869.

Dell vs. Phillips Glass Co. 32 Atl. 601, 602.

Fritz vs. Western Union Tel. Co. 71 Pac. 209.

Henry vs. Cleveland C. C. & St. L. R. Co. (U. S.) 67 Fed. 426.

Above charge is also in conflict with section 3 of the Federal Employer's Liability Act, which provides that where one may have been guilty of contributory negligence, shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The expression of "Contributory negligence" used in this section, must have been intended by Congress to be construed according to the uniform definition of this expression by the text writers and decisions.

Mr. Justice VanDevanter speaking for the Court in the case of,

Mondu vs. N. Y. N. H. & H. R. Co. 223, U. S. 1.

Interpreting the Federal Employer's Liability Act found no occasion to interpret negligence or contributory negligence other than the same is uniformly defined and interpreted. And the fact that in his interpretation of this act, he was not led to say that in order to relieve the servant that his acts and conduct must have been *wilful* in order to defeat his recovery, to say the least is persuasive that Congress never intended that such was the intent of the act.

ASSIGNMENT OF ERROR NO. 12.

The Court erred in that part of its charge as follows:

> "I charge you further that even if the defendant left cars under circumstances detailed in this case on the main line with the brakes unset, and if cars by reason of gravity did move to and upon the switch to the point of collision, yet if plaintiff was warned of danger and given a signal which required him to immediately stop his engine, and if he had promptly obeyed such danger signal, he could with the means at his disposal have stopped his engine and thus avoided the collision, and he then *wilfully* or purposely did not do so, then the negligence of the defendant, if any, is not the approximate cause of the alleged injury, and the plaintiff cannot recover."

As assignments 11 and 12 envolve the same principles they have been considered together.

ASSIGNMENT OF ERROR NO. 13.

The Court erred in sustaining plaintiff's objections to the testimony of Dr. Stark, a witness offered

by the defendant to prove the condition of plaintiff in respect to the injuries alleged to have been received at the date of the accident, and particularly as to the condition of plaintiff's eye, about two months subsequent to the date of the alleged injuries, it not having been shown that the relation of physician and patient existed between the witness and the plaintiff at that time. The evidence as to the incompetency and disqualification of the witness is in substance as follows:

"I reside in El Paso, Texas. I am a physician and surgeon, and have engaged in the practice for sixteen years—in St. Louis and El Paso—two years in St. Louis and fourteen years in El Paso. I am a graduate of the Medical Department of St. Louis University. My specialty is eye and ear work. I have done nothing but this for the last six years. I know T. B. Clark, having known him since June, 1911. I first saw him at Clifton, at the request of Mr. A. T. Thomson, who was at that time connected with the defendant railway company. Mr. Thomson employed me to visit Mr. Clark at Clifton. At that date I examined Mr. Clark at the A. C. hospital. I made an examination of his eyes. * * *

At this point Counsel for plaintiff asked leave to cross-examine witness with purpose of showing the witness disqualification and incompetency. Which was granted by the Court.

In response to questions propounded by counsel for plaintiff witness answered substantially as follows:

"I examined Mr. Clark in June, 1911, at the hospital of the defendant company, in Clifton, Arizona, under the direction of Mr. Thomson. It was at his request that I examined him. I went to Clifton especially for that purpose. Mr. Thomson did not conduct the hospital. I made the examination there for the reason that it was the only place suitable for such examination. I made the examination simply because

Mr. Thomson requested it, without consulting the medical forces. Mr. Thomson wanted the case examined. I was in the employ of the company at that date and had no connection or affiliation with the medical department, or with its hospital. Mr. Thomson paid me my fee for the examination; he was in charge of the railway company. The time covered by the examination was probably one-half or three-quarters of an hour. It was some time during the morning. Mrs. Clark was present. There might have been others present; perhaps Dr. Deitrich. It was in the x-ray room. This room was selected for the reason that it was dark. I had a conversation with Mrs. Clark at the time. I know that during the larger part of the time there was no one present but Mr. Clark, Mrs. Clark and myself. There was no other doctor present, though Dr. Deitrich might have come in I am not postive, however, as to this; he did not participate in the examniation. I had never met Mr. Clark before. I don't know who introduced me to him; possibly the nurse. I don't know whether I was introduced to him in the capacity of physician or not. I think I told him that I was a doctor. I remember that I told him that I was there to examine him, and he consented to it. I don't remember whether I told him of my employment by the company. I don't remember as to this. I don't know whether Mr. Clark assumed that I was a regular physician of the company or not. I cannot say what Mr. Clark assumed. I don't remember having told Mr. Clark that I was from El Paso, though I think perhaps he knew it. In our conversation I think he said he had heard of me. This was not the important thing to me. The time consumed was between one-half an hour and an hour. I derived no information from him as to his condition except at that examination. I knew that he was injured before I came to Clifton. I made no other examination of him except as to his eye. It was not necessary for me to have any information from him to properly diagnose and treat his eye. I could have made the diagnosis and treated him without Mr. Clark saying anything about it."

At this point Counsel for plaintiff asked the Court to permit him to temporarly discontinue the examination of Dr. Stark and call Mr. A. T. Thomson. And the request was granted by the Court. Mr. Thomson testified in substance as follows:

"I had never secured the consent of Mr. Clark for Dr. Stark to examine him. I don't know whether Mr. Clark was advised that Dr. Stark was not one of the regularly employed physicians of the defendant. I compensated Dr. Stark for his services. The compensation was out of the funds of the railway company. The money paid Dr. Stark was not paid him out of the funds of the hospital. The company maintains a medical department and hospital, and did so at this time. The privilege of working in the employment included every medical attention and all the facilities of the hospital. When one is in the employ of the railway company and he is injured is entitled to go into the hospital and be treated in consideration of the fees paid into the Society. The defendant did pay to Dr. Stark for his medical services in attendance upon Mr. Clark in this particular instance. I cannot conceive how Mr. Clark could connect Dr. Stark with the society in any way. The examination took place at the hospital so the Doctor says, I do not know personally anything about it. The hospital does not belong to the railway company or to the Arizona Copper Co. It belongs to the Society."

At this point Mr. Seabury, counsel for the plaintiff renewed the objection to the point, urging it on the ground that it was shown that at the date of examination, there existed the relation of physician and client.

The Court: "I do not think you have shown the relation of physician and client. The best you can say is that the patient may have understood that any communication he gave to the doctor, that the relation existed. Under the testimony thus far advanced, the relation is otherwise."

Mr. Seabury: But if Your Honor please, we claim as a matter of law that when a company undertakes to supply medical treatment to its employees who are injured and actually makes a deduction from the salary or wages of the employees.....

The Court: I understand all of that.

Mr. Seabury: That the lips of that physician are absolutely sealed just as though the retainer had been paid by the plaintiff himself.

The Court: That is unquestionably true, and on that theory I ruled out the declarations of Dr. Deitrich.

Mr. Seabury: We claim further that there is no difference as a matter of law between special employment and a general one.

The Court: I understood that this examination was in reference to this law suit.

Mr. Seabury: There is no testimony to that effect.

The Court: The inference is quite plain from this evidence that this examination was not for the purpose of treatment at all.

Mr. Seabury: I don't know what the purpose of it was.

The Court: If it was of course that ends it.

Mr. Seabury: Suppose for the purpose of negotiating a settlement it would be improper for us to go into the purpose.

The Court: It must be established that he was Mr. Clark's physician.

Mr. Seabury: We admit that but we think that under these circumstances he has a right to claim it.

The Court: You don't think Mr. Thomson's statement that the employment of the doctor was under that Society arrangement whatever that was. He stated quite to the contrary.

Mr. Seabury: I think it was a special arrangement undoubtedly. He testified that the remuneration did not come out of that special fund, but I don't think

that would change the course of conduct of the defendant.

The Court: The thing in my mind is simply this: whether the relation which the doctor sustained was made quite clear or whether the plaintiff knew or whether from the circumstances he had good reason—was put upon notice—that the doctor was not there as his physician in any capacity representing the society or anybody else.

Mr. Seabury: Then the surrounding circumstances do have a bearing for the purpose of this inquiry, whether the relation did exist. That is what I had in mind when we showed all the surrounding circumstances. He examined him under the same circumstances as he might have previously been examined in the hospital under a doctor of the association.

The Court: It doesn't make any difference where it occurred. In his house or elsewhere. If he was there as a hostile witness to get information—not for his benefit but for somebody else's benefit, and if the plaintiff understood that at that time, he cerainly—the communication whatever it was, was certainly not privileged.

Mr. Seabury: May I ask if the plaintiff understood that there was a difference between this doctor and Dr. Deitrich, for example? Would that affect the Court?

The Court: I am inclined to think so. The only thing is whether the circumstances were such as to put Mr. Clark upon notice. If he permitted this examination and made statements under the impression and belief that this doctor was there in his interest as his physician, it is privileged in my judgment—whether the fact be one thing or another—it is the attitude which the plaintiff had in the matter.

Mr. Seabury: May I call the plaintiff to ascertain what he understood in that matter.

The Court: Yes.

Mr. Seabury, Counsel for plaintiff propounded

questions to Mr. Clark. He answered in substance as follows:

"I remember the date of examination very well. I never saw Dr. Stark previous to that date. I had not been previously examined by the doctors in that place, I knew however, that it was the hospital. I knew where the hospital was. It was the A. C. in which injured employees of the defendant are examined. I knew this at the date of examination by Dr. Stark. I think Dr. Deitrich requested me to be examined by Dr. Stark. He told me that Dr. Stark would be there for the purpose of examining my eye. I was at that time under the charge of Dr. Deitrich, who was treating me as my physician. I don't know whether the examination by Dr. Stark was made for the benefit of me or for the benefit of the company. I don't know for whose benefit it was made. I suppose it was made for my benefit. That was what I understood. Apparently Dr. Stark was in consultation with Dr. Deitrich, my attending physician."

The Court: I think the communication was privileged. I will sustain the objection.

Witness was further examined by Mr. Kibbey, associate counsel for the defense. To questions propounded witness answered substantially as follows:

"I think Dr. Deitrich was in Clifton at that date. I think I saw him at the date of examination. He might have been in and out. Previous to that date I had no conversation with the company. I suppose that it was for the information of the company that the examination was made. I understood when the examination was made that it was for the purpose of obtaining information for the company.

Mr. Kibbey: Now we think it is competent.

The Court: That answer is contradictory to the other.

Mr. Seabury: Absolutely.

Mr. Kibbey: Yes, it is.

The Court: I will put a question.

Q. What did you understand was the nature of this examination of your eyes?

A. To know whether it was injured or not.

Q. What difference did it make, whether it was injured or not, in your judgment.

A. It would make a whole lot.

Q. In what way?

A. From good sight to blindness—I wanted that information.

Q. Who wanted it?

A. I wanted it.

Q. You wanted it?

A. I wanted to know the condition of it. When I reported to Dr. Deitrich, he said they had no oculist, and that they would get one, and then I left the thing to Dr. Deitrich, and when they made the appointment I appeared there,—I did not know whether Dr. Stark was one of the corps of physicians and surgeons of the society. I heard that he came from El Paso.

Rec. p 475...folio.....

The Court further erred in this case by holding the burden of proof that evidence is privileged communication upon the one seeking to exclude.

People vs. Austin 93 N. E. 57.

Brown vs. Rome W. & O. Ry. Co. 45 Hun. 239. (N. Y.)

The action of the Court in sustaining the objections to the testimony of Dr. Stark was clearly erroneous for the reason that the relation of patient and physician did not exist, and Dr. Stark was employed and paid by the defendant company for the purpose of being advised of the condition of patient's eye at the date of examination.

He states positively that he saw Dr. Stark at the instance of Mr. A. T. Thomson who represents the

defendant, and upon the intimation of the Court that that objection to the testimony of Dr. Stark over-ruled in a further examination of plaintiff he testified that the examination was made at the instance of Dr. Deitrich, one of the surgeons of defendant. His evidence is further contradictory in that he testified that the examination was made by the company to find out the condition of his eye; and later in his examination testified that when he reported to Dr. Deitrich, he said that they had no oculist and they would get one. Then he left the whole thing to Dr. Deitrich, and when they made the appointment he appeared for examination.

The objection to the evidence is based upon Subdivision 6 of Paragraph, 2535, R. S. Ariz. (1901) As follows:

"A physician, or surgeon cannot be examined without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient. Provide, that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to examination of such physician or attorney."

The objection was sustained on the grounds that communications and examination was of a privileged character and comes within the rule.

Q. I want to get it in the record and state in writing just what I expect to prove.

The Court: Very well! That may be done.

Q. May the records show that we offered Dr. Smith for the same purpose, and that his testimony was excluded.

Printed Rec. p. 476-477...

The action of the Court was erroneous for the reason that the relation of patient and physician was not established. Dr. Stark was not employed or paid by the plaintiff. The undisputed evidence in the cause shows that Dr. Stark was employed as an expert, by the defendant for the purpose of making an exam-

ination of the patient's eye, with the view of ascertaining the extent of the injury. Plaintiff also testified that he desired this information.

The supreme Court of New York, in construing a statute almost identical with Arizona's; held:

"That it does not apply to an expert, though the knowledge acquired by him while attending the patient professionally."

Myers vs. Standard L. S. & Ins. Co. (8th app. div., 74) 40 N. Y. sup. p. 419.

Herrington vs. Winn (60 Hun. 235) N. Y. Sup. p. 612.

The Supreme Court of Indiana in the case of C. I. & L. Ry. Co. vs. Gorman 94 N. E. 730.

Held under same statute that a physician was not disqualified in testifying where the physician stated the purpose of his visit, and in no way attempted to treat the one injured. For the reason that under such conditions no relation of physician and patient ever existed.

ASSIGNMENT OF ERROR NO. 14.

That the court erred in refusing to give to the jury instructions offered by the defendant as follows, to-wit:

"If you should believe from the preponderance of the evidence in this case that the defendant permitted the cut of four cars to remain upon the main line after the engine had been detached therefrom, without having set the brakes thereon or having checked the wheels so as to prevent their rolling by their own gravity, and if the plaintiff was apprised of danger of any kind by a signal which the plaintiff knew signified an emergency under the practice in the operation of railroads in like circumstances was equivalent to an order by the defendant to stop as quickly as the appliances and means of operation under the control of the plaintiff

would enable him to stop, and if it appears that the plaintiff could have stopped and so avoided the collision from which his alleged injuries resulted, and that he failed to do so, the proximate cause of the injury was his own negligence, and he cannot recover in this case."

The first paragraph of this charge requested by the defendant correctly stated the law based on the facts of this case.

If the plaintiff was apprised of the danger by the signal, which plaintiff knew signified emergency, and failed to stop his engine, as quickly as the appliances and means of operation under his control would permit, and to have thus been able to avoid the collission from which the alleged injury resulted, then the approximate cause of the injury was his own negligence and he cannot recover.

"When the act of an individual is the primary cause of an injury to himself he has no right to recover therefor at common law. And this rule is unimpaired by the provisions of the Employers' Liability Act that *contributory* negligence shall not bar a recovery. If the injury of an employee is primarily the result of his own negligence, then it cannot be said to be "due to its (the employers') negligence." Nor does such injury result wholly or in part from the negligence "of any of the officers, agents or employees of such carrier under any proper interpretation of the words."

Daughtery on Liability of Employers' Under Federal Liability Act. (1912) p. 60.

"If you believe that the movement of the four cars in question could not, under all the circumstances, have been reasona'ly prevented, then such movement must be attributable to accident, and if such movement was an accident, the defendant is not liable in this case."

The refusal to give the second paragraph of this charge was error for the reason that if under all the circumstances the movement of the four cars in question, could not have been reasonably anticipated, then such cause would have been attributable to accident.

That was one phase of the case and it was the duty of the Court to charge the jury upon every branch supported by any evidence in the cause.

Dubois vs. Int. Paper Co., 196 Fed. 37.

"Even if the defendant left the cars under the circumstances detailed in this case, on the main line with the brakes unset, and if the cars by reason of gravity did move to and upon the switch to the point of the collision, yet if the plaintiff was warned of danger, or was given a signal which required him to immediately stop his engine within time had he promptly obeyed the signal to have stopped, and thus avoid the collision, and he negligently, or purposely, did not do so, then the negligence of the defendant, if any, is not the proximate cause of the alleged injury, and the plaintiff cannot recover."

Daugherty on Liability under Federal Employers' Liability Act (1912) p. 60.

ASSIGNMENT OF ERROR NO. 15.

Because the court further erred in that part of its charge wherein it instructed the jury that in order to relieve the defendant from liability on account of negligence, the negligent conduct of the plaintiff must be *"wilful and wanton,"* for the reasons stated, supported by authorities cited under assignment No. 11.

ASSIGNMENT OF ERROR NO. 16.

The Court erred in denying motion for a new trial, on the ground urged under this assignment; because the verdict of the jury is excessive under the evidence.

In a case brought under the Federal Employers' Liability Act, in the Circuit Court of the United States, E. D. of Tennessee for damages on account of death of an employee, the jury returned a verdict for $10,000.00. On a motion for a new trial Judge Stan-

ford held this sum excessive and entered an order, providing that if plaintiff within ten days would remit $2,500.00, motion would be denied, otherwise motion would be granted.

Cain vs. S. P. Ry. Co. 199 Fed. 211.
(Advance sheet, Fed. Rep. Nov. 28, 1912.)

ASSIGNMENT OF ERROR NO. 17.

That the evidence at the trial was insufficient to justify the verdict of the jury.

ASSIGNMENT OF ERROR NO. 18.

That the verdict of the jury is against the law.

ASSIGNMENT OF ERROR NO. 19.

That the court erred in sustaining objections to testimony of Dr. Dietrich, whose deposition was offered in evidence, for the reason that the objections offered by plaintiff on the ground that it was privileged were waived by the plaintiff by filing cross-interrogatories to be propounded to witness, and the further reason that it was not shown that the relation of physician and patient existed between witness and plaintiff covering the time of treatment for the reasons stated supported by authorities cited under assignment No. 13.

The Court erred in sustaining objection of plaintiff to the testimony of Dr. Deitrich, whose deposition was offered in evidence by the defendant. For the reason that the relation of physician and patient was not shown.

And for the further reason that the deposition was taken under a stipulation without any objection by plaintiff as to the competency of witness hence his competency was waived.

The judgment of the Court is erroneous in its allowance of interest on the amount found by the jury.

Interest is not allowed in actions of tort in Federal Court as a matter of right. Its allowance as a part of the plaintiff's damages is discretionary with the jury, unless the jury assesses interest as a part of the Plaintiff's damage the Court has no authority to impose this additional burden on the defendant in absence of its assessment by the jury as a part of the damages awarded. White et al vs. U. S. 202 Fed. 501.

(Advance sheets Fed. Rep. Apl. 3, 1913.)

We respectfully submit the verdict is excessive, for the reason it is in conflict with and contrary to the policy of the State of Arizona, as expressed in an act entitled:

An act "securing compensation for injuries to workmen and their dependants, received while engaged in dangerous and hazardous service." Approved June 8, 1912. Sub-division 1 of Sec. 8 of this act provides for the measure and the amount of compensation to servants.

Sub-division 2 of this section provides that in no case shall the amount exceed $4,000.00.

Under the several assignments of error urged, we most respectfully submit the judgment of the lower court should be reversed, and the cause remanded for a new trial.

W. C. McFarlands

Atty. for Plaintiff in Error

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2259.

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,

Plaintiff in Error,

vs.

THOMAS P. CLARK,

Defendant in Error.

Reply Brief of Thomas P. Clark.

Plaintiff in error will be called defendant.

The defendant contends that the proffered testimony of Dr. Stark should have been received, but has failed to come within the well-recognized rule, in that it was not shown that Dr. Stark before making the examination informed Mr. Clark of the nature, purpose and object of his visit, and that with such knowledge Mr. Clark submitted to the examination, but, on the contrary, it appears from the evidence that Mr. Clark was led to believe that defendant had employed Dr. Stark to make the examination for the benefit of Mr. Clark, and in fact the defendant had deceived Mr. Clark as to the purpose and object of the examination.

The rule is well stated by the Supreme Court of California:

> "It seems to me that he occupies a different position than if he had gone there originally upon the suggestion of the defendant, and stated to the patient that he came there solely and entirely at

the request of the defendant, to ascertain the nature and character of her physical injuries, for the purpose of reporting them to the defendant. If he had confined his conduct to such examination and such report, he should have been permitted to testify."

Freel vs. Market Street Cable Ry. Co., 97 Cal. 40;
Chicago, I. & L. Ry. Co. vs. Gorman, 94 N. E. (Ind.) 730;
Munz vs. Salt Lake etc. Ry. Co., 25 Utah, 220.

Respectfully submitted,

L. KEARNEY,
W. M. SEABURY,
Attorneys for Respondent.

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No. 2259

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE ARIZONA AND NEW MEXICO RAILWAY COMPANY,
Plaintiff in Error,
vs.
THOMAS P. CLARK,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR

For convenience and brevity the (Plaintiff in Error) will be herein designated as defendant and the (Defendant in Error) as plaintiff.

In reply to the contention of plaintiff on page 6 of his brief "that a sufficient answer to such contention is that the demurrers and motions are not in the bill of exceptions and cannot be considered:" Say it is not necessary for the Appellate Court to review the decision of the lower Court on the pleadings, that the pleadings should be embodied in the bill of exceptions. It is sufficient if the pleadings and the rulings

appear upon the Record. The demurrers will be found on pages 69 to 72. The motion to make more definite and certain on pages 64 to and including part of page 67. The motion to strike for duplicity on last part of page 64 and to and part of page 67. The Rulings of the Court on these pleadings will be found in the record at pages 85 and 86, and on page 86 defendant's exception to the rulings of the Court below on these pleadings.

That it is not the law nor practice in Federal Courts to require pleadings and the rulings thereon to be embodied in the bill of exception that the same may be reviewed by the court on writ of error, has been very clearly and definitely settled by this court.

In a very recent case involving this identical question, Mr. Justice Woolverton speaking for this Court, clearly stated the law as follows: The action of the Court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and no bill of exceptions is necessary for saving the questions pertaining thereto for the consideration of the Appellate Court. Whenever error is apparent upon the record, it is open to revision, whether it may be made by bill of exceptions or in any other manner (Citing) Suydam vs. Williamson et al. 20 Howard 427. And it was specifically held in Aurora City vs. Welch 7 Wallace 82, that irrespective of the bill of exceptions, the writ of error brings up for review the decision of the Court below in overruling the demurrer."

Mitsui vs. St. Paul Fire & Marine Ins. Co. 202 Fed. 26. (Advance sheets Fed. Rep. March 27, 1913.) Moline Plow Co. vs. Webb 141 U. S. 616.

The plaintiff in his brief cites the case of Phillips vs. Smith, 96 Pac. 91, to sustain his position that the rules of pleading in Arizona are very liberal and as against a general demurrer, every intentment will be made to sustain the pleading. The Supreme Court

of Arizona in this case simply adopted the rule laid down in Pomeroy's Code Pleading (3 Ed. Sec. 549), as the rule on this subject. Neither the decision or Mr. Pomeroy sustains the broad and sweeping rule contended for by the plaintiff, that: "as against a general demurrer every intentment will be made to sustain the pleading." The prevailing rule in the Code States and Federal Courts is: "that it is not the duty of the Court to construe the pleadings more favorable to the pleader than he has himself stated it." Brown vs. King 100 Fed. 561-567.

In reply to plaintiff's contention on pp. 10, 11, 12 and 13. that objections and exceptions were not properly taken by defendant to the rulings of the Court we refer to the Record in this case on page 494 as follows:

Mr. McFarland.—We also desire to except to the giving of each one of the instructions requested by the plaintiff and given by the Court, and we desire to except to the refusal of the Court to give each one of the instructions requested by the defendant and refused by the Court. We desire to except to each of these severally. I think beyond that we are not required to go."

"The Court—I think that ought to be sufficient.

Be it further remembered that at the trial of said cause, and before the jury retired to consider their verdict, that the Court granted permission to the defendant to embody into its bill of exceptions, if it should tender one, its objections to the instructions of the Court to the jury more *fully at length* and *in detail.*

The record conclusively shows that defendant at the trial and before the jury retired to consider their verdict did object and duly exeept to the charge of the Court.

The Record on page 625 shows that on the 2nd day of January 1913 it presented this bill of exceptions and that on said date the same was duly approved by the Court and made a part of the Record.

We respectfully refer the Court to the last three lines at the bottom of page 616, and the first two lines at the top of page 617 of the Printed Record which reads as follows: "The defendant in accordance with the permission of the Court heretofore granted it so to do, as before stated *in this bill of exceptions,* now upon tender of this bill of exceptions states *more fully and in detail* to said instructions," as follows and on pages 617 to and including page 620 objections and exceptions at greater length and more in detail than urged on page 495 of the record, before the jury retired to consider their verdict.

As to the exceptions to the refusal of the Court to give instructions requested by the defendant we refer the Court to that part of the defendant's bill of exceptions Printed Rec. pp. 621-624 and particularly to page 621, which is as follows: "Be it further remembered that at the trial of this cause, and at the proper time and before the jury retired the defendant requested the Court in writing to instruct the jury as follows." The Court is further referred to Printed Rec. pp. 621-624 for exceptions of defendant to the refusal of the Court to give the instructions requested by defendant.

In giving the instructions complained of under defendant's assignment of error numbered 11 and 12 plaintiff confesses error in each of them as will be shown from the following quotation from the record in this case.

"Mr. Seabury.—I respectfully except to the numbered requests submitted by the defendant and charged by the Court. The rules expressly provided that we may except to such matters generally. I now respectfully except to the modification made by the Court of plaintiff's requests number three A in so far as the charge as modified states in substance that if the jury believe that plaintiff was guilty of *wilful negligence* or *gross negligence* that then they must find for the defendant upon the ground that *there is no issue of wilful or gross negligence* on the part of the plain-

tiff in this case, and that the evidence adduced in the case is not susceptible of the inference that the plaintiff was guilty of *gross or wilful negligence* and in that connection we respectfully request your Honor to instruct the jury that there is no such question in this case as *wilful neglect* or want of care on the part of the plaintiff."

In this position of plaintiff by his counsel and for reasons stated we most respectfully concur.

Printed Rec. p. 492.

The authorities cited by the plaintiff in his brief on page 26 and 27 do not sustain his contention that the testimony of Dr. Stark was privileged. The Court of Appeals of New York in the case of People vs. Austin 93 N. E. 57, the Court speaking through Mr. Justice Chase, lays down the rule just opposite to that contended for by plainiff, as follows: "When a physician was sent to a jail by the distrtict attorney to examine the mental and physical condition of a prisoner the *relation* of patient and physician within the Code C. W. Proc. Sec. 834 did not exist and the physician was competent to testify."

The case of Freel vs. Market Street Cable Ry. Co. 31 Pac. 70 is along the lines of other cases cited by plaintiff the Supreme Court of California holding that "when a physician was called as a witness by defendant had obtained his knowledge of the case by *prescribing* for plaintiff he was incompetent to testify under Code Civ. Pro .Sec. 1881 of California which provides that a physician cannot without the consent of his patient, testify to any information acquired in *attending the patient,* which was *necessary to enable him to prescribe for her."*

The case of Henrencia vs. Guzman 219 U. S. 44 is not in point for the reason that defendant after the ruling of the Court excluding the evidence stated explicitly just what testimony it expected Dr. Stark to give. The offer and same ruling was made in respect to Doctors Goodrich and Smith.

Printed Rec. first half of pp. 476 and fist half of page 477.

In support of the position of the defendant that the testimony of Dr. Stark was not privileged, we cite the following cases which are directly in point on this subject. Matter vs. Freeman 6 Hun. (N. Y.) No. 458.

In Scripps vs. Foster 41st Mich. 742 (3 N. W. 216), a physician instituted an action against a newspaper to recover damages caused by the publication of an article to the effect that plaintiff had caused the death of one child and the illness of others by the use of a certain instrument. Several physicians who visited the children stated to have been made ill, were permitted to testify as to their condition. Their testimony was objected to because their knowledge was acquired during visits made as attending physicians.

The Court held that the relation of physician and patient did not exist as no *confidence* was reposed in witnesses, and therefore their testimony was admissible. In Re Bruendl, 102 Wis. 45 (78 N. W. 169) it was held that a physician sent by a relative to ascertain the mental condition of a woman, in order that a relative might determine whether or not to apply for guardianship , might testify as to her mental condition.

In Heath vs. Broadway & R. Co. 8 N. Y. Supp. 863 physician of Railway Co. visited and examined person injured by alleged negligence of the defendant. Upon seeing such person, physician stated that he came on behalf of the Ry. Co. Held that statements made to him by injured person were not privileged.

Testimony will be admitted, if physician states that the information in quesion *was not necessary to enable him to treat* a patient. Halsey's Estate, 9 N. Y. Supp. 441.

In the case of James vs. State 124 Wis. 130 (102 N. W. 320) holds that information acquired in the course of an examination conducted for the purpose of obtaining evidence is not privileged. At the

time the Court excluded the evidence the defendant stated explicitly just what testimony it expected Dr. Stark to give. The offer and same ruling was made in respect to Doctors Goodrich and Smith.

Printed Rec. last half of pp. 476 and first half of page 477.

Ednigton vs. Etna L. Ins. Co. 77 N. Y. 564.
Clark vs. State 61 Pac. 814.
K. C. Ft. S. & M. R. Ry. Co. vs. Murray 40 Pac. 648.

The Court will find from the record of this case as follows:

That the correct doctrine of assumption of risk was raised:

1. By general demurrer.
2. By objection to any evidence.
3. Instruction requested and refused. Rec. pp. 623-625.

On pages 77-79 that the verdict of the jury was returned and the judgment of the Court entered on November 16, 1912. (Rec. pp. 76-78 inclusive.)

That the time of defendant for filing its petition for new trial was by the Court extended forty-two days from November, 28th, 1912. (Rec. pp 96.)

That on the 27th day of December 1912 defendant filed the petition for new trial. (Rec. pp. 98.)

That on January 2nd, 1913 defendant's petition for new trial was by the Court overruled. (Rec. p. 103-104.)

That on March 2nd, 1913, defendant presented its bill of exceptions. Rec. pp. 107 To 625 inclusive

That on Nov. 22nd 1912, the Court by its order extended defendant ten day's additional time to prepare and file bill of exceptions. (Rec. pp. 96.)

That within the time allowed defendant by the rules ten days further time was allowed by the Court

to the defendant to prepare its bill of exceptions. (Rec. pp. 624 : : 625.)

That within the time allowed to-wit: December 6th, 1912, defendant presented its bill of exceptions and asked that the same be allowed, filed and made a part of the record.

That on the 2nd day of January, 1913, in the presence of the parties in open Court, this being the day fixed by the Court therefor, the foregoing bill of exceptions is settled and approved by the Court and having been engrossed, now is signed and directed to be filed and made a part of the record. Rec. pp. 625.

That this bill of exceptions was timely made, approved and allowed by the Court below; that objections made and exceptions taken to the several errors set forth in defendant's assignment of errors and embodied in defendant's bill of exceptions. We respectfully submit that the errors assigned and exceptions thereto are now properly before the Court for review. (Rule 76 U. S. C. C. Court Ninth Circuit.)

Hunnicut vs. Peyton 102, U. S. 333.

Mahoning Valley Ry. Co. vs. O'Hara, 196 Fed. 945.

Respectfully submitted,

W. C. McFarlane

Attorney for Plaintiff in Error.